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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SUFFOLK PARENTS OF HANDICAPPED ADULTS; IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE, and RICHARD ROE, as parents and guardians of, respectively, Lora Hoops; Andrew Gatland; James Sensale; Lourdes Aron; Glenna Hamid; Karen DeVoe; John Doe, and Rachel Roe,

Petitioners,

—v.—

JOHN B. WINGATE, as Commissioner of the Suffolk County Department of Social Services and SUFFOLK COUNTY; GEORGE PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE and BRIAN WING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Does New York State's cutoff of funding for all of its severely disabled citizens, whom New York placed in out-of-state institutions, violate equal protection when New York continues funding for similarly disabled citizens whom it placed in-state?

2. Do petitioners, who are severely developmentally disabled or mentally ill young adults placed as children by New York State in out-of-state institutions, come within the protection of due process by meeting the "deprivation of liberty" standard of *DeShaney* v. *Winnebago County Department of Social Services*, 489 US 189, 200, 201 n. 9 (1989)?*

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* If the due process issue was the ground for this Court's denial of certiorari in the lead case of *Brooks* v. *Giuliani*, 84 F. 3d 1454 (2 Cir.; May 31, 1996); *cert. denied*, ___ US ___, 135 L. Ed. 2d 375 (Nov. 18, 1996), then only the equal protection issue appears to be presented. *But cf. Hopfmann* v. *Connolly*, 471 US 459 (1985).

List of Parties

1. As in caption.

2. There are no parent companies and no nonwholly owned subsidiaries.

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1. *This petition*: 101 F. 3d 818 (2 Cir.; Nov. 4, 1996, as amended Dec. 9, 1996).

   921 F. Supp. 970 (EDNY; Apr. 2, 1996).

2. *This case*: No. 96-7421 (2 Cir.; May 14, 1996; stay granted to county defendants).

   No. 96-7421 (2 Cir.; Dec. 31, 1996; mandate stayed).

   924 F. Supp. 431 (EDNY; Apr. 24, 1996; stay to county defendants denied in part.)

   ___ F. Supp. ___ (EDNY; May 17, 1996; payment by state directed.)

3. *Related cases*:

(a) *Brooks* v. *Giuliani*, 84 F. 3d 1454 (2 Cir.; May 31, 1996); *cert. denied*, ___ US ___, 135 L. Ed. 2d 375 (Nov. 18, 1996); *reversing Brooks* v. *Pataki*, 908 F. Supp. 1142 (EDNY 1995); stay opinion, 908 F. Supp. 1157 (EDNY 1995).

(b) *Westchester Advocates for Disabled Adults* v. *Pataki*, 931 F. Supp. 993 (EDNY; June 17, 1996; injunction granted but stayed as to county); now on appeal, No. 96-9884.

(c) *New York Council for Exceptional People* v. *Pataki*, No. 102684/95 (Sup. NY):

(i) on Article 78 proceeding, unreported order (April 10, 1995); unappealed.

(ii) on declaratory judgment, unreported order (June 13, 1995); *aff'd.*, 220 AD 2d 236, 632 NYS 2d 531 (1 Dept.; Oct. 5, 1995); *lv. denied*, ___ AD 2d ___, ___ NYS 2d ___ (1 Dept.; Nov. 16, 1995), and 87 NY 2d 809 (Feb. 20, 1996).

Jurisdictional Basis

The order of the Court of Appeals sought to be reviewed was initially entered 4 November 1996. (1-21a.) A petition for rehearing under FRAP 40(a) was duly filed on 14 November 1996. The Court of Appeals denied the petition but amended its order on 9 December 1996 (87-89a), and stayed its mandate on 31 December 1996 under FRAP 41(b). (84-86a.) The basis of this Court's subject matter jurisdiction is 28 USC § 1254(1).

Statutes Involved

(i) *Funding*

US Constitution, Amendment XIV, § 1:

". . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The TCF Statute (NY Social Services Law, § 466):

"(2) Social services districts may expend funds to provide transitional care as described in this section. Approved expenditures for transitional care by social services districts. . .shall be subject to state reimbursement at the rate of [60%] for periods on or after January [1, 1995].

* * *

(6) On and after January [1, 1999], all expenditures related to transitional care for persons remaining in such care at that time shall become the sole responsibility of either [OMRDD] or [OMH], whichever has accepted responsibility for the adult placement or services."

(ii) *Power to regulate out-of-state*

US Constitution, Article I, § 10, third clause:

"No State shall, without the Consent of Congress, . . .enter into any Agreement or Compact with another State. . .".

Interstate Compact on Mental Health

"The contracting states solemnly agree that:

Article I

The party states find that the proper and expeditious treatment of the mentally ill and mentally deficient can be facilitated by cooperative action. . .

Further, the party states find that the necessity of and desirability for furnishing such care and treatment bears no primary relation to the residence or citizenship of the patient. . .

Consequently, it is the purpose of this compact and of the party states to provide the necessary legal basis for the institutionalization or other appropriate care and treatment of the mentally ill and mentally deficient under a system that recognizes the paramount importance of patient welfare, and to establish the responsibilities of the party states in terms of such welfare.

* * *

Article III

* * *

(e) Pursuant to this compact, the determination as to the suitable place of institutionalization for a patient may be reviewed at any time, and such further transfer of the

patient may be made as seems likely to be in the best interest of the patient.

Article IV

(a) . . .If the medical or other appropriate clinical authorities having responsibility for the care and treatment of the patient in the sending state shall have reason to believe that aftercare in another state would be in the best interest of the patient and would not jeopardize the public safety, they shall request the appropriate authorities in the receiving state to investigate the desirability of affording the patient such aftercare in said receiving state, and such investigation shall be made with all reasonable speed.

* * *

(c) In supervising, treating, or caring for a patient on aftercare pursuant to the terms of this article, a receiving state shall employ the same standards of visitation, examination, care and treatment that it employs for similar local patients."

The TCF Statute (NY Mental Hygiene Law, § 13.38.)[1]

"(b) The office shall. . .develop a plan and implement procedures. . .to monitor the health and safety of persons receiving transitional funding as described in [NY SSL § 466]. . .

[T]he office shall establish standards governing the quality of care provided to such persons by the residential programs, including standards relating to the develop-

[1] This provision governs the New York Office of Mental Retardation and Developmental Disabilities. See NY MHL § 13.03(1). A parallel provision, NY MHL § 7.38, governs New York's Office of Mental Health. Each quoted provision also refers to "the adult care systems supervised or funded" by each office.

ment and monitoring of written individual services plans for each such person. . .and the investigation of complaints relating to the quality of care or services provided to such persons."

Statement of the Case

1. The Facts

a. Introduction

This is the second of three related actions, brought sequentially as various counties of New York State progressively withdrew from a statutory program. While all constitutional issues discussed here were pleaded in all actions below, two appellate dispositions have been on different grounds. The third action awaits determination at the Court of Appeals.[2]

Brooks was decided at the Court of Appeals on alternate grounds of *res judicata* and due process. (84 F. 3d at 1463-4 [res judicata]; 1466-7 [due process].) The opinion of the Court of Appeals in this action, in contrast, did not involve *res judicata*; elaborated the *Brooks* due process ground, and

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[2] The five counties constituting New York City withdrew effective 1 June 1995, prompting the filing of *Brooks* v. *Pataki*, 908 F. Supp. 1142 (EDNY 1995), *r'vd. sub nom. Brooks* v. *Giuliani*, 84 F. 2d 1454 (2 Cir.; May 31, 1996); *cert. denied*, ___ US ___, 135 L. Ed. 2d at 375 (Nov. 18, 1996; "*Brooks*" hereafter). Suffolk County's withdrawal, effective 1 January 1996, led to this action ("*Suffolk Parents*" hereafter). Westchester County's withdrawal one month later resulted in *Westchester Advocates for Disabled Adults* v. *Pataki*, 931 F. Supp. 993 (EDNY; June 17, 1996), now on appeal. The remaining 55 counties of New York State have remained within the program as of the date of filing of this petition. A separate action, filed 3 February 1997, challenges administrative hearing requirements in all cases. *Nassau Parents and Guardians of the Handicapped* v. *Pataki*, No. CV 97-0551 (USDC, EDNY). Those issues are not presented in this petition.

added a full treatment of equal protection. (9-14a [due process], 14-20a [equal protection].)

It is clear that this Court's denial of *certiorari* in *Brooks* did not involve equal protection grounds. New York there argued that the issue was not presented.[3] Moreover, our letter supplemental to petition, based on this Court's grant of certiorari in an equal protection case, *Quill* v. *Vacco*, ___ US ___, 135 L. Ed. 2d 1127 (1996), was received the day after *certiorari* was denied. Accordingly, the equal protection issue was not before this Court in *Brooks*, but is presented here.

It is unclear whether the *Brooks* denial of certiorari was on grounds of *res judicata* or due process, as each issue was there presented. If *res judicata* was the reason, then there is no barrier here, because that defense was not interposed in *Suffolk Parents*. Accordingly, we reiterate and update our *Brooks* due process submission on the assumption (and in the hope) that the due process issue remains open. See *Hopfmann* v. *Connolly*, *supra* n. *, 471 US at 461.

b. Summary

Petitioners[4] are severely retarded young adults, involuntarily institutionalized by New York State.

As children, all were institutionalized with a special education placement in neighboring states.[5] All were retained in

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[3] New York Brief in Opposition to Petition for a Writ of Certiorari, p. 11 (No. 96-373).

[4] This is an action commenced in Brooklyn federal court under the civil rights laws, 42 USC § 1983, in the name of the disabled individuals ("Petitioners"), by their parents or guardians. Violations of due process and equal protection are claimed.

[5] Pennsylvania; New Jersey; Connecticut; Massachusetts, and Rhode Island. All are parties to the Interstate Compact on Mental Health, codified at, respectively, 62 P.S. §§ 1121-1148; NJSA 30:7B-1 to 18; CGSA §§ 17a-615 to 618; MGLA c. 123 App., §§ 1-1 to 4, and [R.I.] Gen. Laws 1956, §§ 40.1-9-1 to 3. In New York, the Compact is codified at NY MHL § 67.07.

the same institutions when they reached adulthood, because no appropriate adult facilities were available in New York. All remain utterly incapable of making their own decisions for residence, care and treatment. (See 4-5a; 17-18a.)

Most petitioners have been severely disabled from birth. Other disabilities arose in childhood. In all cases, state action dealt with their condition, including initial placement; continuing funding; funding cutoffs, and attempted transfers.

New York State has stopped funding petitioners' care in order to force them to leave the institutions in which they have spent most of their lives, and which have become their homes. The sole reason for the cutoff is the out-of-state location of the institutions.

It is undisputed that:

(a) As children, petitioners were placed in neighboring states for special education by New York, because their disabilities were too severe for New York State treatment capabilities;

(b) New York funded the same placement after the children "aged out" of the educational placement when each became 21;

(c) There are still no appropriate, available in-state facilities. (4-5a; 17-18a.)

c. State placements of children

New York State has assumed responsibility for disabled children within its special educational process. See *Brooks*, *supra*, 908 F. Supp. at 1143. Support is given whether the disabled child is placed within New York State or outside of it. NY Educational Law, §§ 4401, *et seq*. In all cases, the State must approve the proposed placement. New out-of-state placements under the special education statute continue to this day.

d. State funding for new adults

New York State continued to assume responsibility for these disabled children past their twenty-first birthday. In a program called "transitional care funding" ("TCF"), New York ratified and continued the initial placement because there remained no in-state facility appropriate for petitioners.

Annual budget appropriations were made from 1982 to 1993. In 1994, the TCF program was codified in various places, including § 466 of the New York Social Services Law ("SSL") and § 13.38 of the Mental Hygiene Law ("MHL") (collectively, the "TCF Statute").

Having "aged out" of an educational placement, petitioners remained at the same out-of-state institution under the TCF program. Only the source of funding changed. There remained no new in-state facilities appropriate for petitioners' severe disabilities.

e. County withdrawal and state funding cutoff

New York State chose to share its TCF program responsibility with its 62 counties. It took the position that each county's participation was both voluntary and indispensable. When a county withdrew from the TCF program, as seven did, New York claimed that the TCF program ended as to those disabled individuals referred from a withdrawing county. Effective upon each county's withdrawal, New York State stopped paying for petitioners' out-of-state care.[6]

f. State court statutory construction

In *Brooks*, upon notice of New York City's withdrawal, a group of parents sued in state court for a construction of the

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[6] All petitioners in *Brooks* were referred from the five counties within New York City, which is a single "social services district" under the TCF Statute. See NY SSL § 61(1). The sixth and seventh withdrawing counties were Suffolk and Westchester. 55 counties remain as of the date of this petition.

TCF Statute. They sought a declaration of, *inter alia*, the State's duty to fund the program share of any withdrawing county.

Two weeks after the effective date of the City's withdrawal, a trial-level court issued a declaratory judgment interpreting the funding aspects of the TCF Statute. It sustained the State's position that its payment was contingent upon county participation. *New York Council for Exceptional People* v. *Pataki*, No. 102684/95 (Sup. Ct., NY Co., June 13, 1995; unreported).[7]

2. Proceedings Below

a. District Court

Following its earlier opinions in *Brooks* v. *Pataki*, 908 F. Supp. 1142 and 1157 (EDNY 1995), the District Court found state action in the institutionalization process; held that a notice period was required for county withdrawal from the TCF system, and imposed backup financial responsibility on New York State. On due process grounds, it held that funding could not be removed from these plaintiffs merely because a county chose to leave the system. *Suffolk Parents of Handicapped Adults* v. *Pataki*, 921 F. Supp. 970 (EDNY; April 2, 1996; 22-53a). Equal protection was discussed, but not decided. (40-41a; see 14a.)

In subsequent proceedings, the District Court stayed its injunction in part against the County defendants while directing immediate, full funding from New York State. *Suffolk Parents of Handicapped Adults* v. *Pataki*, 924 F. Supp. 431

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[7] The trial court's view was subsequently affirmed. *New York Council*, *supra*, 220 AD 2d 236, 632 NYS 2d 531 (1 Dept.; Oct. 5, 1995). Leave to appeal to the New York Court of Appeals was denied in orders by both the Appellate Division of the New York Supreme Court (Nov. 16, 1995), unreported, and the Court of Appeals, 87 NY 2d 809 (Feb. 20, 1996).

(EDNY; April 24, 1996; 54-74a), and ___ F. Supp. ___, 1996 WL 285423 (EDNY; May 17, 1996; 75-79a).

In the third related case, the District Court issued the same injunction as in *Suffolk Parents*, adding equal protection as an alternate holding, while rejecting a venue challenge. *Westchester Advocates for Disabled Adults* v. *Pataki*, 931 F. Supp. 993 (EDNY; June 17, 1996). In the same opinion, reflecting appellate decisions in the earlier actions,[8] the District Court stayed its order as to the Westchester County defendants.

b. Court of Appeals

The first act of the Court of Appeals pertinent to this petition occurred on 14 May 1996, when it granted a full stay to the county defendants. *Suffolk Parents of Handicapped Adults* v. *Wingate*, No. 96-7421 (2 Cir.; May 14, 1996; 80-83a), partially reversing 924 F. Supp. 431 (54-74a). Two weeks later, it reversed the lead case on the merits. *Brooks* v. *Giuliani*, 84 F. 3d 1454 (2 Cir.; May 31, 1996). After argument of *Suffolk Parents* the following month, it directed supplemental briefing of equal protection issues. (14a.)

On 4 November 1996, the Court of Appeals reversed the District Court. On due process grounds, it did so under constraint of *Brooks* v. *Giuliani*, *supra*. (10-14a [majority]; 21a [Parker, J., concurring].) On equal protection grounds, it concluded that a lack of regulatory "control" over out-of-state facilities constituted a rational basis for admittedly disparate treatment. (14-20a.) Despite a written admission of New York's actual exercise of regulatory power over these petitioners (and those in *Brooks*) (90-96a)[9], the Court of Appeals

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[8] See *b*, below.

[9] That power is based, inter alia, on the Interstate Compact on Mental Health. Under the Compact Clause (Art. I, § 10), Congressional consent empowers states with common interests to agree to share regulatory power. The Court of Appeals ignored the regional regulatory system created by this Compact.

adhered to its decision upon rehearing, amending its language to make its conclusion of state impotence stronger. (*Cf.* 17a *with* 89a.)[10]

The Court of Appeals reluctantly denied relief in these words:

> "New York's program may well be bad public policy, but it does not violate the Equal Protection Clause." (19a; citation and internal quotation omitted.)

Despite its reversal, the Court of Appeals emphatically and unanimously recognized the crisis driving petitioners to this Court:

> "Unfortunately, there appear to be no placements available in New York for these plaintiffs. They have multiple, profound disabilities, and have special needs requiring particular services that are not everywhere available.
>
> * * *
>
> The *appalling fact* is that there is a limited capacity in New York State for the care and treatment of people who are as severely disabled as plaintiffs." (17-18a; emphasis added.)

Summary of Argument

Despite the urgent language quoted above, the Court of Appeals twice refused to grant relief. Over a strong dissent, the *Brooks* panel found that individuals institutionalized and funded by New York State were somehow not within the "custody" found necessary in *DeShaney*, *supra*, despite an express reservation for this situation at n. 9 of this Court's opinion. The *Suffolk Parents* panel then found—despite an express

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[10] We await the decision of the Court of Appeals in *Westchester Advocates*.

written admission to the contrary by New York—that there was no power to "regulate" the out-of-state placement, thus providing a rational basis for disparate treatment.

Because New York can and does "regulate" the treatment of its citizens placed out of state, through payment and visitation (see 90-96a), petitioners submit that there is no rational basis for New York's admittedly disparate treatment of the severely disabled. (Point I, below.)

We also submit that *DeShaney*, *supra*, does not preclude the assertion of due process rights, as petitioners comfortably fit within the dictum of n. 9 of the *DeShaney* opinion. (Point II, below.)

We add a clarion note of urgency. Severely disabled young adults, fragile to the point of fracture and bonded to their caregivers of twenty years, face a devastating separation from their homes unless this Court holds that they are protected by the Fourteenth Amendment.

ARGUMENT

I. THERE IS NO RATIONAL BASIS FOR NEW YORK'S DISPARATE FUNDING OF SEVERELY DISABLED YOUNG ADULTS.

The ground rules of equal protection analysis on these facts are clear. A statute which distributes benefits unequally, as the TCF Statute does, is subject to at least rational basis scrutiny. *Zobel* v. *Williams*, 457 US 55, 60, 67 (1982). When state legislation is involved, as it is here, there is a presumption of constitutional validity if the statutory classification is "rationally related to a legitimate state interest". *City of Cleburne* v. *Cleburne Living Ctr. Inc.*, 473 US 432, 440 (1985).

The Court of Appeals properly found disparate treatment. (17a.)[11] It then concluded that an inability to regulate out-of-state programs constituted a "rational basis" for denying funding at age 21. (89a; *cf.* 17a.) Accepting such a justification *arguendo*, as a matter of constitutional theory, it fails both on principles of interstate cooperation and on the undisputed facts.

Regulation includes the power to affect conduct. New York "regulates" those who care for its citizens out-of-state by approving a placement, both initially and on a continuing basis, and by paying for the services provided. If an out-of-state caregiver violated New York's standards, the state could demand conforming change and withdraw the individual from that placement if no change occurred. The power of the purse includes an ability to control what is purchased.

This logical conclusion is assisted by both a New York statute and an interstate compact.

The TCF Statute itself applies to a placement "supervised *or funded*" by New York (NY MHL §§ 7.38[b], 13.38[b]; emphasis added). Aspects of the statute include the power to monitor; to establish standards; to remove the individual placed, and to withdraw funding. (*Ibid.*; see, also, subsection [d] of each.) There is no geographic limit to the statutory power; it applies to all "receiving transitional funding". NY MHL §§ 7.38(b); 13.38(b).

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[11] The disparate treatment was a creation of statute. New York created the division of the protected group by its placement of disabled children, with some retained in New York and others placed out-of-state. From 1982 to 1994, funding was provided for each group. The TCF Statute violated equal protection by denying funding to the out-of-state placements only. The State started with a protected group; divided it by its funding conduct under the TCF Statute, and then used its own conduct as the very justification for disparate treatment. As the District Court noted in *Brooks*, "[T]his. . .is the very essence of arbitrary state action." (908 F. Supp. at 1154, quoting from *Logan* v. *Zimmerman Brush Co.*, 455 US 422, 442 [1982].)

Even more to the point, a "receiving state", with the consent of Congress,[12] empowers New York's "regulation" under the 1956 Interstate Compact on Mental Health (the "Mental Health Compact").[13] The Mental Health Compact creates a "system" involving "cooperative action" in the area of "patient welfare." (Art. I.) It grants a "sending state" express powers of suitability review; retransfer; demand for investigation, and enforcement of uniform standards. (Arts. III[e]; IV[a], and IV[c].)

It is indisputable that the power to "regulate" out-of-state placements, through inspection and oversight, was actually exercised here. (90-96a.) The incorrect conclusion of absence of power to affect conduct cannot provide a rational basis for disparate treatment. As Mr. Justice Scalia has noted in another context:

> "[T]he Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things. . . .",[14]

There can be no legitimate state purpose served in leaving a group of profoundly disabled New York State citizens stranded in an out-of-state facility, at severe risk of being discharged to the street. This is a classic example of a withdrawal:

> "from [one group], but no others, of specific legal protection: . . . [I]t imposes a special disability upon those persons alone." *Romer* v. *Evans*, ___ US ___; 134 L. Ed. 2d 855, 863, 865 (May 20, 1996).

Accordingly, this Court should review and redress New York's violation of equal protection.

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12 U.S. Const., Art. I, § 10.

13 Codified at NY MHL § 67.07. See n. 5, *supra*, for codification in the states providing TCF care.

14 *United States* v. *Burke*, 504 US 229, 119 L. Ed. 2d 34, at 50 (1992; Scalia, J., concurring).

II. THOSE INVOLUNTARILY INSTITUTIONALIZED BY STATE ACTION ARE WITHIN DUE PROCESS PROTECTION.

Petitioners submit that they are involuntarily institutionalized, by state action, and are within the due process protection hypothetical stated in *DeShaney*, *supra*:

> "Had the State, *by the affirmative exercise of its power*, removed Joshua from free society, and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration *or institutionalization* to give rise to an affirmative duty to protect." (489 US at 201, n. 9; emphasis added.)

Petitioners' position breaks no new constitutional ground. Generally, a protected interest may not be removed (by lack of funding, or otherwise) without due process. See, *e.g.*, *Paul* v. *Davis*, 424 US 693, 710-1 (1976), and *Vitek* v. *Jones*, 445 US 480, 489, 490 n. 6 (1980). This general principle was applied to the handicapped and retarded in state-directed custody in *Youngberg* v. *Romeo*, 457 US 307, 317 (1982).

Youngberg remained good law in this area after *DeShaney*. (See 489 US at 198-200.) The issue involved here is whether the facts of this case fit within this language in *DeShaney*:

> "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—*through incarceration, institutionalization, or other similar restraint of personal liberty*—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause. . . .". (489 US at 200; emphasis added.)

The consequence is clear. If there is no state deprivation of liberty, no due process obligation is owed even upon actual knowledge of impending abuse. If the state restrains liberty, then due process rights attach and are governed by *Youngberg*.

supra. The District Court based its injunction on *Youngberg*-protected rights, an analysis which Judge Parker endorsed in his dissent in *Brooks* at the Court of Appeals.

All panel judges agreed that there was state action in connection with the institutionalization of each petitioner. As the *Brooks* panel majority concluded, "We accept the idea of state action in this case *arguendo*", upon the following evidence:

> "[T]he State approved out-of-state placements, monitored out-of-state facilities, and in essence is deemed to have caused the out-of-state placement by its failure to find a satisfactory in-state placement." (84 F. 3d at 1466, n. 13.)

It is undisputed that petitioners' severe disabilities compel their institutionalization. As Justice Blackmun sensitively noted in *Youngberg*, *supra*:

> "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution, and total dependence on the institution for all of their needs, is as much liberty as they ever will know." (457 US at 327.)

Youngberg, not *DeShaney*, applies here. The facts of *DeShaney* did not rise to levels requiring *Youngberg* protection, because Joshua DeShaney was not institutionalized. Here New York, "by the affirmative exercise of its power, removed [petitioners] from free society, and placed [them]" in an out-of-state institution. (489 US at 201, n. 9.) This is an "institutionalization to give rise to an affirmative duty to protect" under *DeShaney*. (*Ibid.*)

On these facts, petitioners submit that the quoted language of *DeShaney* would conclude that their liberty interests were restrained by state action, and that *Youngberg* protection thereby attached, justifying the injunction. The duty to protect in *DeShaney* would become a duty to pay here: a duty to

continue the *status quo* (and home) enjoyed by each petitioner since childhood.

Conclusion

For the reasons set forth above, this Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
March 6, 1997

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2224—August Term 1995

(Argued: June 24, 1996 Decided: November 4, 1996)

Docket Nos. 96-7421, 96-7470, 96-7630

SUFFOLK PARENTS OF HANDICAPPED ADULT; IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE; RACHEL ROE; LORA HOOPS; ANDREW GATLAND; JAMES SENSALE; LOURDES ARON; GLENNA HAMID; KAREN DEVOE; RICHARD ROE, as parents and guardians of, respectively, Lora Hoops; Andrew Gatland; James Sensale; Lourdes Aron; Glenna Hamid; Karen DeVoe; John Doe, and Rachel Roe,

Plaintiffs-Appellees,

—v.—

JOHN B. WINGATE, as Commissioner of the Suffolk County Department of Social Services and SUFFOLK COUNTY; GEORGE PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE and BRIAN WING,

Defendant-Appellants.

Before:

MINER, JACOBS, and PARKER,
Circuit Judges.

Appeal from a preliminary injunction of the United States District Court for the Eastern District of New York (Trager, *J.*) that, *inter alia*, (1) required Suffolk County and certain County officials to provide transitional care funding for the out-of-state residential care of four severely disabled adults for six months, until those persons complete an orderly transition to appropriate in-state care; and (2) ordered that if any of the four disabled adults remained in out-of-state facilities after six months, defendant state officials must provide transitional care funding until an appropriate and orderly transition is completed.

Vacated and remanded. Judge Parker concurs and in addition files a separate concurring opinion.

WILLIAM J. BURKE, New York, NY, THOMAS COVAL, Willow Grove, PA (Lisa K. Friedman, New York, NY, Robert M. Freedman, Freedman & Fish, New York, NY, of counsel), *for Plaintiffs-Appellees.*

AMY L. ABRAMOWITZ, Assistant Attorney General, New York, NY (Dennis C. Vacco, Attorney General of the State of

New York, Barbara G. Billet, Deputy Solicitor General, New York, NY, of counsel), *for Defendants-Appellants Pataki, Maul, Stone, and Wing*.

JAMES M. CATTERSON, Deputy County Attorney, Hauppauge, NY (Robert J. Cimino, Suffolk County Attorney, Theodore D. Sklar, Thomas M. Merritt, Assistant County Attorneys, Hauppauge, NY, of counsel), *for Defendants-Appellants Gaffney, Wingate, and Suffolk County*.

JACOBS, *Circuit Judge*:

The United States District Court for the Eastern District of New York (Trager, *J.*) entered a preliminary injunction which provided, *inter alia*, that (1) defendant Suffolk County must pay for the out-of-state residential care of four severely disabled adults for up to six months, or until they complete an orderly transition to appropriate in-state care; and (2) if any of these four individuals remain in out-of-state facilities after six months, defendant state officials must assume responsibility for their care until such an orderly transition is completed. In light of our recent decision in *Brooks v. Giuliani*, 84 F.3d 1454 (2d Cir. 1996), *reh'g denied*, No. 95-9178 (2d Cir. Aug. 7, 1996), *petition for cert. filed*, 65 U.S.L.W. 3185 (U.S. Sept. 9, 1996) (No. 96-373), and our rulings in this opinion, we vacate the injunction and remand.

BACKGROUND

The plaintiffs are the guardians of four severely disabled individuals over the age of 21 who are residents of Suffolk County, New York; and Suffolk Parents of Handicapped Adults, an unincorporated association which includes plaintiffs' guardians as members.[1] (For ease of reference, "plaintiffs" hereinafter refers to the four disabled individuals on whose behalf the named plaintiffs brought this suit.) The defendants are Suffolk County and two of its officials (collectively, "Suffolk County") and certain officials of New York State (the "State Defendants").[2]

When the plaintiffs were children, Suffolk County's local school boards placed them in out-of-state facilities for residential care, because no appropriate in-state facilities were available. These placements, made in each instance with State approval, were arranged for the purpose of complying with the Individuals with Disabilities

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[1] The complaint was filed by six named plaintiffs and "Jane Doe" and "Richard Roe." As the district court has noted, two of the named plaintiffs, who were the guardians of two disabled individuals, have withdrawn from the suit. *Suffolk Parents of Handicapped Adults v. Pataki*, 921 F. Supp. 970, 972 n.3 (E.D.N.Y. 1996). The complaint alleges that "Jane Doe and Richard Roe . . . represent[ ] additional parents and guardians listed in Schedule A hereto." There is no "Schedule A" to the complaint reprinted in the Joint Appendix, and, apparently, no such schedule was before the district court. *See id.* at 972 & n.3 (noting that "[t]he present action involves four . . . plaintiffs" but that "[o]riginally there were six plaintiffs").

[2] The county officials are Robert J. Gaffney, County Executive, and John B. Wingate, Commissioner of the Department of Social Services. The state officials are George E. Pataki, Governor; Thomas A. Maul, Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities (the "OMRDD"); James L. Stone, Commissioner of the New York State Office of Mental Health (the "OMH"); and Brian Wing, Commissioner of the New York State Department of Social Services (the "DSS").

Education Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq.* (formerly the Education of the Handicapped Act) and New York State Education Law ("Education Law") §§ 4001-4006, 4401-4410 (McKinney 1995). Collectively, these statutes entitle all physically and mentally disabled children in New York to a free education, suitable to their needs, and require localities to contract with residential facilities in other states if facilities appropriate to a particular child's needs are not available in-state. *See, e.g.*, Education Law §§ 4002(1), 4407(1)(a).

Although plaintiffs' out-of-state placements were fully supported by federal and state funding, that funding ended once the plaintiffs turned 21 and "aged out" of the IDEA-mandated regime. Suffolk County, like other New York State counties, voluntarily assumed responsibility for the costs of plaintiffs' out-of-state care when they turned 21; this provision of funding is known as "Transitional Care Funding" ("TCF"). State agencies paid, and continue to pay, 100% of the costs of care for individuals who reside at facilities in-state.

From 1982 through 1994, New York State reimbursed counties for 50% of the costs of TCF. In the absence of substantive legislation addressed to this need, the State's 50% contribution was provided each year through an earmarked appropriation in the State's Aid to Localities Budget. In 1994, New York State enacted a statute, effective January 1, 1995 (the "TCF Statute"), that placed these arrangements on a different footing. The TCF Statute increased the State's reimbursement of TCF costs to counties from 50% to 60%; mandated an eventual phase-out of all out-of-state placements; and provided that (if the phase-out was not accomplished) the State would assume 100% of the costs of out-of-state placements by 1999 for those still remaining in such

placements. *See* N.Y. Soc. Serv. Law § 466(2), (5), (6) (McKinney Supp. 1996).

Prior to 1996, Suffolk County provided TCF for the plaintiffs and other individuals. However, the county executive had repeatedly tried to omit TCF from the county budgets for the years 1989 through 1995; each time, that effort was thwarted by the county legislature. But in November 1995, the county legislature voted to omit TCF from the 1996 county budget; soon after, the County notified the State that it would not provide TCF for 1996. Since State assistance is a reimbursement mechanism for expenditures made by the counties, Suffolk County's refusal to provide TCF meant that the State would also cease to contribute to the plaintiffs' TCF costs.

On January 23, 1996, the plaintiffs commenced this § 1983 action in the district court alleging violations of procedural due process, substantive due process, equal protection, and other "constitutional dut[ies]," and seeking restoration of TCF until the plaintiffs effect an orderly transition into appropriate in-state facilities. On February 21, 1996, the plaintiffs moved for a preliminary injunction. In an opinion issued April 4, 1996, the district court granted a preliminary injunction providing that, *inter alia*, (1) Suffolk County must resume payment of TCF for six months (of which the State would reimburse 60%, pursuant to its statutory undertaking), during which time the State Defendants are ordered to "use all good efforts, using professional judgment," to assist the plaintiffs in transferring to appropriate in-state facilities in an orderly manner; and (2) if any of the plaintiffs remain in out-of-state placements after six months, the State Defendants must assume the full burden of funding those placements until the transfers are completed. *See*

Suffolk Parents of Handicapped Adults v. Pataki, 921 F. Supp. 970, 986 (E.D.N.Y. 1996). In an opinion issued May 2, 1996, the district court granted in part and in part denied Suffolk County's motion for a stay of the injunction pending appeal,[3] but clarified the injunction in one crucial respect: the court ordered that, following the six-month period for which the County is responsible for TCF, or should the County prevail on appeal, the State Defendants must "take all necessary steps"—including providing 100% of TCF for the plaintiffs still residing in out-of-state placements—until appropriate transfers are made to in-state facilities. *Suffolk Parents of Handicapped Adults v. Pataki*, 924 F. Supp. 431, 443 (E.D.N.Y. 1996).

On May 14, 1996, this Court granted Suffolk County's motion for a stay of the district court's injunction as to the County. On May 17, 1996, consistent with its previous ruling, the district court ordered the State Defendants to assume responsibility for 100% of TCF until the plaintiffs are transferred to appropriate in-state facilities. No. CV-96-0288 (DGT), 1996 WL 285423, at *2 (E.D.N.Y. May 17, 1996).

DISCUSSION

Generally speaking, a court should not grant a preliminary injunction unless the party seeking the injunction demonstrates (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) "sufficiently serious questions" on the merits and a balance of

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[3] The district court granted the portion of Suffolk County's motion that requested a stay with respect to the payment of arrears. *See Suffolk Parents of Handicapped Adults v. Pataki*, 924 F. Supp. 431, 443 (E.D.N.Y. 1996).

hardships that "tip[s] decidedly" in the movant's favor. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). We have held, however, that "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme," the district court should not apply the less stringent "serious questions" standard, but should instead require the movant to satisfy "the more rigorous 'likelihood of success' standard . . . ." *Able v. United States*, 44 F.3d 128, 131, 132 (2d Cir. 1995) (quoting *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989) (internal quotations omitted)); *see also*, *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996). Judge Trager recognized that "the more demanding standard of 'likelihood of success on the merits[ ]' " applied to plaintiffs' case, but concluded that "plaintiffs have clearly met that more stringent standard." *Suffolk*, 924 F. Supp. at 441. We agree that this stricter standard applies here.

We review for abuse of discretion a district court's grant of a preliminary injunction. *Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994). An abuse of discretion may be demonstrated by showing that the injunction is based on an error of law. *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir. 1993). For reasons explained below, we hold that the district court committed such an error of law in granting the injunction, thereby abusing its discretion. We therefore vacate the preliminary injunction and remand.

The district court's opinion relies chiefly upon the Fourteenth Amendment's Due Process Clause; and we address that ground first. The district court also may have considered plaintiffs' argument that the Fourteenth Amendment's Equal Protection Clause provided an alter-

native ground for granting the injunction. We address the equal protection ground second.

A. *Due Process.*

The district court concluded, relying chiefly on *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984), that the plaintiffs had "a liberty interest in humane institutionalization, with conditions and changes determined with the exercise of professional judgment," and that this liberty interest is protected by the Due Process Clause of the Fourteenth Amendment. *Suffolk*, 921 F. Supp. at 980. As to Suffolk County, the court ruled that it "is entitled to terminate its TCF participation, but it must do so in a way that comports with the Due Process Clause, giving TCF beneficiaries time to obtain alternative care." *Id.* at 985. The County's "abrupt end" of TCF payments, according to the district court, showed an "absence of professional judgment" that presented " 'sufficiently serious questions going to the merits' " of the plaintiffs' constitutional claim. *Id.* at 984 (quoting *Jackson Dairy*, 596 F.2d at 72). The preliminary injunction therefore required Suffolk County to resume TCF payments for another six months, so that the County could eventually withdraw from TCF obligations while still affording the plaintiffs time to find alternative placements. *Id.* at 986.

Turning to the State Defendants, the district court recognized that New York State "has the right under the federal Constitution, as well as under state law, to terminate the TCF program." *Id.* at 982. The court held, however, that "the State does not have the constitutional right to withdraw from the TCF program without providing the essential due process needed—which in this

instance means reasonable notice that would permit the making of alternative arrangements." *Id.* Since the district court found that "[t]he State is the entity ultimately responsible under the federal Constitution" for making sure that the plaintiffs' transfers comported with due process, *id.* at 985, the court provided in its injunction that the State Defendants must assume sole responsibility for the plaintiffs' TCF and orderly transfers to in-state placements, when and if Suffolk County's obligations end. *Id.* at 986. The State Defendants represented to the district court that New York State would continue making partial reimbursement of Suffolk County's TCF payments, whether those payments are voluntary or compelled by the district court. *Id.* at 986; *Suffolk*, 924 F. Supp. at 436. The State Defendants object, however, to the court's ruling that they must be responsible for the plaintiffs' TCF and orderly transfers if and when Suffolk County is permitted to stop paying for TCF.

This issue is controlled by our recent decision in *Brooks v. Giuliani*, 84 F.3d 1454 (2d Cir. 1996), *reh'g denied*, No. 95-9178 (2d Cir. Aug. 7, 1996), *petition for cert. filed*, 65 U.S.W.L. 3185 (U.S. Sept. 9, 1996) (No. 96-373), which was issued after the injunction was entered in this case, and which arose from the decision by New York City (like Suffolk County) to end TCF for severely disabled adults who were living in out-of-state care facilities. *Id.* at 1457-58. The *Brooks* plaintiffs, however, first sued the City and the State in the New York State courts. The state courts held that neither the City nor the State had any obligation, under either New York statutory law or New York's constitution, to maintain TCF. *Id.* at 1459; *see New York Council for Exceptional People v. Pataki*, No. 102684/95, slip op. at 9 (N.Y. Sup. Ct. N.Y. County June 13, 1995), *aff'd*, 632

N.Y.S.2d 531 (App. Div. 1st Dep't 1995) (mem.), *appeal denied*, 87 N.Y.2d 809, 642 N.Y.S.2d 195 (1996). The *Brooks* plaintiffs then brought suit in federal court, also before Judge Trager, to obtain the relief that they were denied in state court. The district court granted a preliminary injunction that required the defendant New York State officials to maintain TCF payments for the *Brooks* plaintiffs until they were transferred to in-state facilities. 84 F.3d at 1462. On appeal, we held that since the plaintiffs had the opportunity to seek the same relief in their state court proceedings, many of their claims were barred by res judicata. *Id.* at 1463-64.

One due process claim in *Brooks*, however, was not barred by res judicata, because it arose from events that postdated the state court litigation. In *Brooks*, as in this case, the district court relied on *Youngberg* and *Society for Good Will* for the proposition that the plaintiffs had a due process right to " 'professional judgment' in establishing safe conditions and freedom from undue restraint" and " 'professional judgment in devising programs that seek to allow patients to live as humanely and decently as when they entered the school.' " *Id.* at 1465-66 (quoting *Brooks v. Pataki*, 908 F. Supp. 1142, 1150-51 (E.D.N.Y. 1995)). We held that the *Brooks* plaintiffs had no right under the Due Process Clause to any continued payments for TCF by the defendant state officials. *Id.* at 1466-67.

" '[T]he Due Process Clause[ ] generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.' " *Id.* at 1466 (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989)). The *Brooks* plaintiffs, who had no entitlement

to TCF payments under New York law, could not find an independent source of entitlement in the Due Process Clause. The Supreme Court identified only a single exception to this rule: " 'when the State takes a person into its custody and *holds him there against his will*, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.' " *Id.* (quoting *DeShaney*, 489 U.S. at 199-200 (emphasis added)). We concluded that the district court's reliance on *Youngberg* was misplaced, because in *Youngberg* the institutionalized individuals had been involuntarily committed. *Id.* We further concluded that *Society for Good Will* was distinguishable, because in that case the State's obligation to provide some quantum of care and funding was undisputed. *Id.* Since the *Brooks* plaintiffs were not involuntarily institutionalized, we held that "the [preliminary] injunction cannot be premised on a duty to 'exercise professional judgment' under *Youngberg* and *Society for Good Will*, because there is no such duty here." *Id.* at 1467.

In the present case, the preliminary injunction is premised solely on the same "obligat[ion] to exercise professional judgment" that the district court imposed in *Brooks* and that we subsequently rejected. *Suffolk*, 921 F. Supp. at 980 (citing *Youngberg*, *Society for Good Will*, and *Brooks v. Pataki*, 908 F. Supp. at 1151) (internal quotations omitted). The district court specifically rejected the State Defendants' reliance on *DeShaney*, in part by finding that "the plaintiffs' placements are not necessarily to be regarded as 'voluntary.' " *Id.* at 981. The district court recognized that the plaintiffs, as children, "were placed voluntarily by their parents and local school boards"; but the court concluded that, since the plaintiffs "are now adults who have not given consent

and are, in fact incapable of doing so," they were being institutionalized involuntarily within the meaning of *DeShaney*. *Id.* In support of this conclusion, the district court asserted that the plaintiffs "would not be released if they simply asked to be released." *Id.* Nothing in the record supports this conclusory statement. In the first place, neither the County nor the State has custody of the plaintiffs. And neither government would be funding the plaintiffs' institutionalization but for the district court's injunction. Both Suffolk County and the State Defendants strenuously disavow any interest in preventing the plaintiffs' departure from their out-of-state institutions. If the point of the district court's finding is that the private residential institutions in which the plaintiffs live would require a guardian's consent before acceding to a residential patient's request to leave, that is not relevant to any restraint imposed by the County or the State. As the State Defendants argue: "to the extent plaintiffs themselves could not 'simply request their own release,' their parents or guardians are authorized to make such requests for their release." State Defendants' Brief at 17. Thus, as in *Brooks*, this is not a case where the defendants have attempted to exert or maintain custody over the plaintiffs; on the contrary, "[t]he whole effort of the guardians . . . has been to prolong the involvement of [the County] and the State in the funding of institutional placements as to which [the County] and the State have washed their hands." *Brooks*, 84 F.3d at 1466.

In sum, the plaintiffs here, like the plaintiffs in *Brooks*, are not involuntarily institutionalized. The plaintiffs here have no entitlement under New York law to TCF funding from either Suffolk County or the State Defendants. *New York Council for Exceptional People*,

slip op. at 9. Nor can they claim any such entitlement from any of the defendants under the Due Process Clause of the Fourteenth Amendment. *Brooks*, 84 F.3d at 1465-67. That being the case, the district court's preliminary injunction was premised on an error of law, and, consequently, was an abuse of discretion. *County of Seneca*, 12 F.3d at 11.

B. *Equal Protection.*

Although the district court's opinion alludes only briefly to "an Equal Protection violation in the State's refusal to fund TCF recipients in out-of-state facilities," *Suffolk*, 921 F. Supp. at 980, the complaint raises an equal protection argument, and both parties referenced the issue (without pressing it) in their briefs. At oral argument, plaintiffs requested that we consider equal protection as an alternative basis for the district court's injunction, and we invited the parties to submit supplemental briefing on that point.

Plaintiffs' equal protection claim posits that the State, by placing some handicapped children in out-of-state facilities and placing others in-state, divided into two groups a single class of severely disabled people—whom plaintiffs claim are "a protected class"—and then used that very division to justify dissimilar treatment, by way of a funding cut-off, for those initially placed out-of-state. Plaintiffs acknowledge that their initial placement out-of-state as children "did serve the legitimate state function of providing care for its severely disabled citizens," but they contend that "[u]nconstitutional conduct occurred . . . when a part of the disabled group was stripped of funding . . . by [the State's] reaction to county withdrawal from the TCF program." The thrust of plaintiffs' argument is summarized in the passage they

quote from the opinion of the district court: "The State materially assisted in creating the very distinction that then formed the basis for its discrimination . . . ."[4] *Suffolk*, 921 F. Supp. at 980.

It is elemental that "disparate treatment is not necessarily a denial of the equal protection guaranteed by the Constitution"; rather, the Supreme Court has afforded "wide discretion . . . to the states in establishing acceptable classifications." *Quill v. Vacco*, 80 F.3d 716, 725 (2d Cir. 1996). In particular, states "must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that *account for limitations on the practical ability of the State to remedy every ill.*" *Id.* (emphasis added) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The general rule, therefore, is that "state legislation or other official action that is challenged as denying equal protection . . . is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest." *City of*

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[4] We reject plaintiffs' suggestion that they be treated as a "protected class" for purposes of equal protection analysis. The Supreme Court specifically refused to recognize the mentally disabled as a "quasi-suspect" class in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985). Likewise, Judge Trager concluded in his recent decision in the related case of *Westchester Advocates for Disabled Adults v. Pataki*, 931 F. Supp. 993 (E.D.N.Y. 1996), that, under our analysis in *Quill v. Vacco*, 80 F.3d 716, 725-27 (2d Cir. 1996), questions involving the provision of TCF to disabled individuals "fall[ ] within the category of social welfare legislation and [are] subject to rational basis scrutiny." 931 F. Supp. at 1010; *see also*, *Catlin v. Sobol*, 93 F.3d 1112, 1120 (2d Cir. 1996) (applying rational basis review, and not intermediate scrutiny, to equal protection claim involving provision of education to mentally retarded). Moreover, this case involves different treatment between two groups of similarly disabled individuals, not a differentiation between people with—and people without—disabilities.

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see also Quill*, 80 F.3d at 725.

Plaintiffs (and the district court) erroneously focus on the *withdrawal of funding* as the juncture at which "[u]nconstitutional conduct occurred." This approach, however, collapses the analysis and ignores the events and programs that created the funding disparity. The distinction between individuals placed in-state and those placed out-of-state was first made when the County and State, acting together in compliance with the IDEA and the State Education Law, placed the plaintiffs (as children) in out-of-state residential care facilities because no appropriate facilities were available in-state.[5]

This initial differentiation between groups of disabled citizens was never challenged on equal protection grounds, and was unquestionably a rational act in pursuit of legitimate ends—the placement of each individual where that individual's singular needs could best be served. Indeed, plaintiffs concede that "[t]he initial placement out-of-state did serve the legitimate state function of providing care for its severely disabled citizens. As there were insufficient appropriate facilities in-state, New York properly found and funded placements in nearby states." Thus the State's classification "carries a presumption of validity," because it was admittedly " 'rationally related to a legitimate state interest' " when implemented. *Quill*, 80 F.3d at 725 (quoting *Cleburne*, 473 U.S. at 440).

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[5] According to plaintiffs, their "due process analysis *begins with state placement* . . . in childhood," while their equal protection claim "points to invidious differences . . . *once the threat of funding cutoff becomes a reality*." (Emphasis added.)

We therefore accept that the initial difference in treatment had a rational basis, and turn to the more troublesome question of whether there is a rational basis for the programs that create the disparity in New York State's funding of care for disabled adults. (There can be no equal protection claim against Suffolk County, which now pays nothing for *any* of its disabled adults, and indeed the plaintiffs have made no such claim.)

The State asserts that it has a rational basis for funding only in-state residential programs that it can inspect and certify—if not regulate outright—and through which it can at least monitor the care given to its disabled citizens. We think that the State has a legitimate interest in licensing, certifying, and overseeing the treatment programs and residential care facilities for which it pays and in which its disabled adult citizens are placed.[6] The agencies charged with administering the State's programs, however, have no authority to supervise or, indeed, even to inspect, the facilities in neighboring states where the plaintiffs now live.[7]

Unfortunately, there appear to be no placements available in New York for these plaintiffs. They have multiple, profound disabilities, and have special needs requiring particular services that are not everywhere available. The complaint alleges, for example, that plaintiffs "cannot receive adequate care in at-home pro-

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[6] *See, e.g., Catlin v. Sobol*, 93 F.3d 1112, 1120 (2d Cir. 1996) (citing *Martinez v. Bynum*, 461 U.S. 321, 328, 329 (1983)) (agreeing that New York State has a "legitimate interest[ ] [in] reserving services for bona fide residents and preserving local control over educational services").

[7] The State Defendants point out that, under the mandatory educational placement scheme established by the IDEA and State Education Law, the State has express statutory authority to make and supervise the out-of-state placements of its disabled children. *See, e.g.*, Education Law Art. 81, 89.

grams," but "require institutionalization, or supervised care." *See also Suffolk*, 921 F. Supp. at 972 ("There is no dispute . . . that the plaintiffs' disabilities are severe nor that plaintiffs require institutionalization."); *id.* at 980 ("These TCF recipients . . . are incapable of functioning outside of the institutions in which they have resided for years, unless a myriad of support services are provided, if at all."). The appalling fact is that there is a limited capacity in New York State for the care and treatment of people who are as severely disabled as plaintiffs. According to the State, there currently is a waiting list of over 5,000 individuals who are seeking adult residential placements within the system administered by New York's Office of Mental Retardation and Developmental Disabilities ("OMRDD"). Plaintiffs concede that "no facilities appropriate for the [disabled adults] were available within New York State . . . to meet the[ir] special and unique needs . . . ." *See also Suffolk*, 921 F. Supp. at 979 (noting the great "limitations on availability of appropriate programs for transfer of TCF recipients" and the State's "difficulty in obtaining appropriate placements [for] their young adult clientele, particularly the multiply-disabled") (citation and internal quotation omitted).

A waiting list for a program with limited capacity is not itself a violation of equal protection.[8] Here, plaintiffs

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[8] No one is suggesting that the disabled individuals currently in New York's fully-funded in-state program be displaced. As the plaintiffs assert in the complaint, disabled adults in residential placement lead a precarious existence requiring delicate treatment: because they (presumably) "receiv[e] appropriate care in their present facilities" and "have been in those facilities since early childhood," these individuals "have become accustomed to those facilities and have bonded with their caregivers." Complaint ¶¶ 17, 18. As a result of "their extreme fragility, both physical and mental, all [such disabled adults] face severe trauma and potential regression if removed from their present facilities." *Id.*

concede that rational and fair educational decisions taken by the State (and others) have resulted in their being excluded temporarily from New York's fully-funded program for in-state disabled adults.

The State has also adopted a program for severely disabled adult citizens who reside temporarily in out-of-state institutions. That program, involving the partial reimbursement of counties' expenditures for TCF, resembles many legislative or regulatory schemes in which a state offers partial funding of a program as an inducement for its counties or municipalities to participate—and of course the federal government gives similar incentives to the states. The decision by a state not to participate in a federal program that would benefit a class of its citizens is not a denial of equal protection to those individuals relative to persons similarly situated, but resident in participating states. By the same token, the disabled adults from Suffolk County who were placed in out-of-state facilities are not being denied their rights to equal protection *by New York State* simply because Suffolk County has elected not to accept the State's offer of reimbursement under the TCF program.[9] As this Court has recently stated in a similar context, New York's program may well be "bad public policy," but it "does not violate the Equal Protection Clause." *Catlin v. Sobol*, 93 F.3d 1112, 1121 (2d Cir. 1996).

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[9] The preliminary injunction entered by the district court in this case radically impairs the interim funding scheme of the State's TCF statute. If the State's obligations were as the district court held them to be, the partial reimbursement mechanism designed to induce counties to pay TCF would fail altogether, because every New York county would know that its non-participation and willingness to forgo the State's offer of 60% funding would merely trigger a 100% funding obligation on the part of the State.

In summary, (a) New York had a rational basis for placing some of its disabled children in schools within the state while placing others outside the state, wherever the State's duty to provide an education could best be carried out; (b) New York now has a rational basis for a program that funds the care only of those individuals who are institutionalized in New York State; and (c) New York has a rational basis for reimbursing counties that voluntarily undertake to fund the care of their residents who are institutionalized out-of-state. A disparity results from all of this, but an equal protection violation does not.[10]

CONCLUSION

For the reasons set forth above, we vacate the preliminary injunction of the district court and remand.

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[10] In addition to its argument that the district court's due process analysis was erroneous, Suffolk County contended that (1) the district court wrongly substituted its judgment for that of the county in local budgetary matters; (2) the court misapplied the standards for injunctive relief; and (3) the court's injunction effectively granted the plaintiffs summary judgment without notice to the defendants. In light of our holding that the district court's due process and equal protection analyses were erroneous, we do not address these other contentions.

Suffolk County also claimed that the court displayed a bias in the plaintiffs' favor that mandated recusal. We find this argument to be without merit.

FRED I. PARKER, *Circuit Judge*, concurring:

I concur in the due process section of this opinion, despite my earlier dissent in *Brooks v. Giuliani*, 84 F.3d 1454, 1468 (2d Cir.), *reh'g denied*, No. 95-9178 (2d Cir. Aug. 7, 1996) because I believe that case to be completely controlling of this one on that issue. I also join the remainder of the opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-96-0288 (DGT)

SUFFOLK PARENTS OF HANDICAPPED ADULTS; and IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE, and RICHARD ROE, as parents and guardians of, respectively, LORA HOOPS; ANDREW GATLAND; JAMES SENSALE; LOURDES ARON; GLENNA HAMID; KAREN DEVOE; JOHN DOE, and RACHEL ROE,

Plaintiffs,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE; BRIAN WING, and JOHN B. WINGATE, as Commissioners of, respectively, the New York State Office of Mental Retardation and Developmental Disabilities; the New York State Office of Mental Health; the New York State Department of Social Services, and the Commissioner of the Department of Social Services; and SUFFOLK COUNTY,

Defendants.

MEMORANDUM AND ORDER

TRAGER, *District Judge*:

This case is the second of possibly three cases concerning the care and treatment of profoundly disabled and medically

fragile adults whose rights under the federal Constitution have been gravely imperiled as the result of an unfortunate funding dispute between the State of New York and three of its local governments. These adults have been the beneficiaries of a joint state and local program called Transitional Care Funding (TCF). The program was developed to provide a bridge between educational placements of severely disabled persons in residential programs and long-term adult residential care after they "aged-out" of educational placements at the end of the school year in which they became twenty-one.

The first suit arose from the withdrawal by New York City from TCF at the end of May 1995, and, ultimately resulted in State assumption of full responsibility for funding.[1] Following New York City's successful withdrawal, the Suffolk County Executive, always frustrated by the State's refusal to assume full financial responsibility for the program, finally determined to emulate New York City's withdrawal from the program and, last November, obtained the necessary approval from the County Legislature.[2]

Background

(1)

The present action involves four severely disabled, multiply handicapped, plaintiffs,[3] all of whom were placed, with the approval of the State, in out-of-state institutions as chil-

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[1] This result was ordered by this court in *Brooks v. Pataki*, 95-CV-2902. An appeal is pending.

[2] Westchester County has also withdrawn from TCF. A lawsuit has been filed in this court against it and the State. *Westchester Advocates for Disabled Adults v. Pataki*, 96-CV-0930.

[3] Originally there were six plaintiffs. However, subsequent to the commencement of this action, one plaintiff, James Sensale, who 'aged-out' in 1995, has been placed in an Office of Mental Retardation and Developmental Disabilities (OMRDD) facility, and another plaintiff, Glenna Hamid, who had been at the Perkins School for the Blind in Massachusetts, has returned home. Tr. at 18-19.

dren, years ago, because no appropriate treatment programs were available in-state. For example, one plaintiff, aged twenty-five, diagnosed as functioning in the profound range of mental retardation, with cerebral palsy and a seizure disorder, has been at The Woods School, in Langhorne, Pennsylvania, since she was placed there by a Suffolk County local school district nineteen years ago, at the age of six. Pltf. Mot. Hoops Aff.

There is no dispute by either the County or the State defendants that the plaintiffs' disabilities are severe nor that plaintiffs require institutionalization. The State's position, however, is that, under state law, it is authorized only to reimburse localities for their expenditures for the care of TCF clients. Further, the State maintains that the court has erred in finding that the constitutionally protected liberty interests of these severely disabled persons are impaired by the State's role in the abrupt cessation of funding for their placements without providing adequate opportunity for them to locate alternative care in New York. Tr. at 26-27. Abramowitz Ltr. dated March 8, 1996 at 4.

The State disclaims responsibility for TCF recipients on the basis of its use of third parties: localities for payments to providers and financial management and private institutions for provision of care. The State also relies on the expressed disclaimer of "entitlement" in the TCF statute.[4] The State's division of responsibility for TCF recipients among several of its agencies, as well as local governmental bodies—ranging from local school districts to the county—has also made it possible for a State representative to come into court and assert that TCF recipients, despite their having been placed in institutions many years ago with the specific approval of the State Education Department, stand in the same position as

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[4] The TCF Statute, Chapter 600 of the laws of 1994, § 16: No provision of this act shall be deemed or construed to create any right, interest or entitlement for any individual to receive mental hygiene, education or social services funds or services, or placement in a mental hygiene facility, or any other right, interest or entitlement to services, funds or placement.

persons coming into placement from their own homes. Tr. at 21, Brooks Tr. at 27. The State's role in educational placements, prior to the TCF recipients "aging-out," has been neither acknowledged nor denied by the State, which has sought to confine its role to that assigned to two of its agencies, the Office of Mental Retardation and Developmental Disabilities (OMRDD) and the Office of Mental Health (OMH).

Nor does the County dispute the plaintiffs' need for care. On June 9, 1995, Suffolk County (County) Department of Social Services (DSS) Commissioner Wingate wrote to the parents of plaintiff Sensale, who was to "age-out" of his educational placement on July 1, 1995, in response to a letter Sensale's parents had written to the Legislature to protest the County's announced intention of accepting no new TCF clients on that date: "Please be assured that it was never my purpose to suggest that your son does not need the level of care he is presently receiving at the Woods School." County Ex. I. In his July 25, 1995 letter to the TCF parents, Commissioner Wingate wrote:

> The fact that Suffolk County can no longer cover the cost of Transitional Care . . . *does not mean a disruption in the continuity of care for [your child].* Use the remaining months of this year to let OMRDD know of your concerns and urge them to find or develop what is long overdue—appropriate adult facilities for all those who aged out of residential care.

County Ex. A (Emphasis added.).

All of the plaintiffs, with one exception, were originally placed in out-of-state residential care as children by Suffolk County local school boards with the approval of the State Education Department[5] because no adequate programs or placements were available in New York State. These educa-

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[5] The exception, plaintiff Sensale, came from foster care, and was, apparently, originally placed, not by a local school board, but by the County, itself, in his TCF residential placement at The Woods School, Kelsch Aff. dated March 13, 1996 ¶3, but has now been placed in-state by OMRDD. Tr. at 16.

tional placements could be made *only* after five refusals by in-state institutions and *only* if the State approved. Tr. at 28. The TCF recipients in Suffolk County in November 1995 range in age from twenty-two to thirty-one. County Ex. E.

(2)

TCF was established in 1983 because the State could not accommodate all the individuals who had been placed for educational reasons as soon as the school year ended in which they turned twenty-one, a process called "aging out."[6] Thus TCF recipients remained in their educational placements even after they reached twenty-one and the locality's educational obligations to them under federal law expired. TCF provided that their expenses were to be paid under a formula in which localities were reimbursed by the State for fifty percent of the costs of continued placement until January 1, 1995, when the State's share increased to sixty percent.[7] In 1996, under the statute passed in 1994, new entry into TCF was to be ended, and in 1999, the State was to assume complete responsibility for all those remaining in TCF status.

As previously mentioned, this lawsuit arose out of the County's unhappiness with the State's failure to assume full funding of residential placement of these severely disabled adults. This would ordinarily be solely a responsibility of the

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[6] In 1983, a subcommittee of the State Legislature reported that the problem was the result of, first, the passage of the Federal Education of All Handicapped Children Act in 1975 guaranteeing a "free appropriate public education" to all handicapped children and, second, the deinstitutionalization of OMRDD following the Willowbrook Consent Decree. "Aging Out: The Crisis in Transition at Age 21 for Disabled Individuals in Need of Adult Services," N.Y. State Assembly Subcomm. on Human Rights, January 14, 1983, at 2, Pltf. Ex. 7.

[7] Prior to the passage of the TCF statute, Chapter 600 of the laws of 1994, TCF was simply an item in the State's Budget resolution, with no statutory authorization. Susan Demers, General Counsel of N.Y.S. Dep't of Social Services, Mem. to Elizabeth D. Moore, Counsel to the Gov., 7/21/94, *New York Council for Exceptional People v. Pataki (NYCEP)*, Record on Appeal to the App. Div., 1st Dep't, at 90.

State. It is a responsibility that will, in fact, be the State's once the plaintiffs are placed appropriately in adult facilities in New York State. The County's frustration with the State plus budgetary pressure led it to withdraw from the program under which it, after State reimbursement, paid forty percent of the costs of these individuals' care. The 1996 annual cost of the program was estimated, in a County legislative submission to be $1,863,858. County Brf. Addendum I. As the County would be entitled to reimbursement of sixty percent of that amount, its actual 1996 cost would be $745,543 if the State placed none of the current group of TCF recipients before year end.

This court has dealt previously with a locality's withdrawal from the TCF program in *Brooks v. Pataki*, 95-CV-2902. *See Brooks I*, 908 F.Supp. 1142, 1144-45 (E.D.N.Y. 1995), (describing the history of TCF in New York State.) In *Brooks I*, plaintiffs, New York City residents, were granted a preliminary injunction against the State defendants that ordered the State defendants to fund the plaintiffs' placements during a transition period in which in-State placements are sought and given appropriate review. *See*, *id.* at 1149-54, (analyzing the constitutional issues presented in that case.) *See also Brooks II*, 908 F. Supp. 1157 (E.D.N.Y. 1995) (denying State defendants' request for a stay pending appeal.)

The Suffolk County Executive has an extensive history, going back almost eight years, of omitting the TCF program from its proposed budget. These efforts have been repeatedly thwarted by the County Legislature (Legislature), at least, that is, until November 1995. A further effort was made to restore the program in February 1996.

In 1989, the County Executive announced its decision to withdraw and notified state agencies, providers and parents. The County Legislature then restored full funding and the County Executive did not veto the program. (Plaintiffs aver that County Executive Halpin attempted to cut the program even earlier than this, in 1988, and the County Legislature restored the program. Probeyahn Aff. ¶5.) Again in 1990, the County Executive eliminated TCF from the County budget

and notified all parties, but again the County Legislature restored TCF funding. Kelsch Aff. dated February 23, 1996 ¶23. Plaintiffs submitted a copy of a June 10, 1992 letter from Robert J. Gaffney, County Executive, to Albert Robidoux, Director, Long Island Developmental Center (the local OMRDD office, a Developmental Disabilities Service Office (DDSO)),[8] notifying him that the County would fund only the TCF incumbents as of February 13, 1992 and only until December 31, 1992. Pltf. Ex. 13. The legislature restored the funds, then as before. Probeyahn Aff. ¶7. Only in 1991, 1993 and 1994 were there no efforts by the County Executive to omit TCF from its proposed budget. The plaintiffs suggest that the 1993 and 1994 restraint was the result of the pending TCF reform, vetoed by Governor Cuomo in 1993 but reintroduced and enacted in 1994. *Id.* ¶7-8.

The following narrative of the County's 1995 actions regarding TCF is based on the chronology submitted by the County. Sklar Ltr. dated March 15, 1996.[9] In May 1995, one year before the TCF statute eliminated new intake into the program, County DSS Commissioner Wingate announced that the department would not accept the eight individuals who were "aging-out" at the end of that school year. The County DSS Commissioner notified the State, the schools and the TCF recipients' parents/advocates of this plan, but, as before, the County Legislature, on September 8, 1995, restored full funding.

In June 1995, County DSS Commissioner Wingate submitted his proposal to omit TCF from the County's proposed budget for the coming year, and, in July, notified the parents of incumbent TCF recipients (but not the parents of those who aged out in mid-1995) and the State commissioners who are defendants here (or their predecessors), as well as the

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[8] The Long Island Developmental Disabilities Service Office is the local office for Nassau and Suffolk Counties of the State agency, OMRDD. *See* N.Y. Mental Hyg. L. §13.17.

[9] Plaintiffs' supplemental illustrations of Executive defunding of the program followed by Legislative restoration are merely corroborative of the pattern established by the County's own submissions.

OMRDD director for Long Island, Marvin Colson, of the plan. The County did not attach copies of the Commissioner's letters to the institutions in July 1995, but it avers that notification was also sent to the institutions at that time. Sklar Ltr. dated March 15, 1996, Chronology.

Following the announcement by County DSS, in July 1995, regarding its planned 1996 budget, as had also occurred following the May 1995 announcement that no new TCF recipients would be accepted, parents and other interested parties began lobbying the County legislators, meeting, as previously, with encouragement from the legislators.

The County DSS refusal to accept the 1995 TCF intake was an active issue over the summer of 1995. For instance, on July 28, 1995, the presiding officer of the Legislature wrote the local OMRDD director, acknowledging the effort to deny TCF funding to the eight persons who "aged out" of educational placements in 1995, stating:

> As Presiding Office (sic) of the Suffolk County Legislature, I want to advise you and the schools that provide the services received by Suffolk county residents, that we are diligently working together with the state and the county to find the necessary funding to maintain the level of services needed by these individuals.
>
> This is written, in the hope that the schools will not act precipitously against the interest of the clients who need their care and will be aware of the legislature's efforts, along with the State, to find the necessary funding.

Attached to Abramowitz Ltr. dated March 8, 1996.[10]

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[10] The County objects, not to the validity of the letter, but to the estoppel they believe that the State is asserting to have resulted from it. "If the State defendants are trying to either extract themselves from liability to the plaintiffs, or are trying to draw Suffolk County into sharing some liability based upon letters written by a member of the County Legislature, then Suffolk County respectfully insists that the State present its excuses for failing to act by competent witnesses subject to cross examination." Sklar Ltr. dated March 13, 1996. No estoppel is attributed to unilateral acts of either of the County's governmental branches where approval by both is required.

On September 8, 1995, the County Legislature, by a vote of thirteen in favor, four opposed, and one abstention, approved a bill directing payment, through 1995, of the costs of residential placement of the eight persons who "aged-out" in 1995. The County Executive approved the bill on September 22, 1995.

Although the County DSS intent to omit TCF from the 1996 County budget was announced in July 1995, the County Executive's 1996 Recommended Budget that formally omitted TCF was presented to the Legislature and the public only on September 14, 1996. In October 1995, the Legislative Budget Review Office released its evaluation of the Recommended Budget, recommending against restoration of TCF in 1996. On October 23, 1995, County DSS Commissioner Wingate stated, in his message to an Operating Budget Meeting of the Legislature, that an amount sufficient only for carryover 1995 TCF expense had been included in the 1996 budget proposal for his agency.

On November 8, 1995, the Legislature approved the 1996 budget bill with only the carryover amount for TCF. The Legislature also voted on a separate resolution to restore funding for TCF in the 1996 County Budget on that date. A majority, eleven of eighteen legislators, voted for the resolution but that margin failed to achieve the super-majority of fourteen required to restore the funds.

On November 24, 1995, more than two weeks after the adoption of the 1996 County Budget omitting TCF on November 8, 1995, County DSS Commissioner Wingate wrote the State Defendants, giving "*official notice* that effective January 1, 1996, Suffolk County Department of Social Services will discontinue funding for all individuals in the Transitional Funding Program." (Emphasis added.) He attached a listing of eighteen TCF recipients that included six persons who had not been on the July list (some of those who aged out in 1995) and omitted two persons who had been on the July list. County Ex. E (November letters to State officials) (emphasis added) and Ex. B (July letters to State officials). The County also notified the institutions at which the

TCF recipients resided that TCF funding would end on December 31, 1995.[11] County Ex. D.

(3)

Although disclaiming all constitutional responsibility for the Suffolk County TCF recipients, the State concedes that it received and took cognizance of Suffolk County's "official notice" of its intent to withdraw from TCF contained in the Commissioner Wingate's letter of November 24, 1995. Abramowitz Ltr. dated March 8, 1996. The State notes, however, that, even after the County's November 1995 letter, it received a further communication from the Presiding Officer of the County Legislature, indicating further efforts on the part of the legislators to restore funding. On January 22, 1996, the Presiding Officer of the Legislature, Donald R. Blydenburgh, in a letter to the OMRDD Long Island director, Marvin Colson, wrote:

> As Presiding Officer of the Suffolk County Legislature, I want to advise you and the schools that provide the services received by Suffolk County residents, that I have introduced a resolution to restore the funds necessary to complete this program in 1996. The resolution will come before the Budget Steering Committee the end of February. If it passes out of committee, it will come before the general legislature at the March 5, 1996 meeting.
>
> I am working diligently to find the necessary funding to maintain the level of services needed by these individuals. This is written in the hope that the schools pro-

[11] In its chronology, the County states that it sent letters to the institutions in July 1995, notifying them that funding would end on December 31, 1995. However, although the County has submitted samples of each of the other letters sent on that date, and has included samples of letters to institutions with its sets of letters for the May defunding of new TCF intake and for the November defunding official notice, it has not included a sample of a July 1995 letter to institutions with its other July 1995 letters to the recipients and to the State.

viding services will not act against the interest of the clients who need their care.

Attachment to Abramowitz Ltr. dated March 8, 1996.

The State has not claimed that this communication has been taken as any indication that expedited placement of the Suffolk County TCF recipients is not necessary. During oral argument on March 6, 1996, the State defendants reported having placed all of the 1995 TCF intake, *id.*, as well as having a potential placement for one of the named plaintiffs. Tr. at 18.

(4)

Plaintiffs filed this action on January 23, 1996. On February 21, 1996, plaintiffs moved for a preliminary injunction against both defendants and, in the alternative, against the State alone, returnable March 6, 1996. The County did not answer the complaint but, on February 29, 1996, cross-moved for my recusal and, in the alternative, for dismissal of the complaint per Rule 12(b)(6). All parties have submitted briefs, affidavits and documents. Oral argument was presented on March 6, 1996. The County's motion for my recusal and its request for certification of that issue to the Second Circuit were denied for the reasons stated on the record. Tr. at 2-6.

Following oral argument the State submitted a letter brief, dated March 8, 1996, and, at the Court's invitation, Suffolk County submitted a reply dated March 13, 1996. The County also submitted, on March 15, 1996, again at my request, a chronology of the County's legislative and executive actions with regard to TCF funding during 1995.

Discussion

This court found, in *Brooks v. Pataki I*, 908 F. Supp. 1142, 1149-54 (E.D.N.Y. 1995), that constitutionally protected liberty interests of the profoundly disabled adults in the TCF program were implicated by the extensive and determinative State involvement in their initial institutional placement out-

of-state and in their remaining in out-of-state placements.[12] The State was involved in plaintiffs' institutional placements, both before and after the plaintiffs were twenty-one, due to the State's responsibilities for education and for the care of severely developmentally disabled adults.[13] The fact that the State has shifted responsibility for these TCF recipients from the State Department of Education to the Department of Social Services and the Office of Mental Retardation and Developmental Disabilities and has placed responsibility for direct financial administration on the locality, does not mean that the State itself is not responsible for the plaintiffs' institutionalization. The State seems to argue that, because everyone is responsible, no one is responsible. The State has been far more than a passive funding source with no involvement in individual cases. The State cannot avoid its constitutional responsibilities by its delegation of parts of them to others.

In addition, in *Brooks*, the State took precipitate action following the cessation of City TCF funding that endangered the fragile individuals involved. *See Brooks I*, 908 F.Supp. at 1152-53. The precipitate attempts at transfer by the State seen in *Brooks* were, happily, absent here, but the State involvement in the plaintiffs' placement is as pervasive here as it was there. Here, however, no state court judgment precludes analysis of the locality's constitutional obligations to the TCF recipients it had funded for many years.[14]

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[12] Six Suffolk County TCF recipients, not named plaintiffs, are in non-adult placements within New York State. Tr. at 18. The issues presented by these placements are not before the court here nor in *Brooks v. Pataki*. The State's refusal to fund these in-state TCF placements is based on continuing placement of adults in programs for children, rather than on the blanket refusal to fund out-of-state placements. Mr. Kietzman of OMRDD stated that OMRDD was working to "find a certified basis" to provide payment to two of these in-state TCF recipients. Tr. at 17.

[13] "[T]he State reimburses school districts 85 percent on average . . ." State Budget Memorandum on the TCF Statute (1994), (Budget Memo), *NYCEP* Record on Appeal at 111. The State reviewed out-of-state placements by school authorities on an individual case-by-case basis. Tr. at 28, *Brooks* Tr. at 45.

[14] In *Brooks*, following *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) ("Section 1983 . . . does not override

(1)

The task of transferring multiply disabled persons like the plaintiffs from one institutional treatment setting to another cannot be accomplished overnight or even in a few months. As the New York State Executive Department noted in its Memorandum concerning the TCF statute in 1994, referring to persons in transitional care: "[T]he potential for serious disruptions in care for these young adults, who have less tolerance for disruption than most others in our systems of care, remains higher than is warranted." *New York Council for Exceptional People v. Pataki (NYCEP)*, Record on Appeal to the App. Div., 1st Dep't, at 85. New York City's experience, even after the State had agreed to a settlement in 1991 under which it would place most priority TCF referrals within *twenty-four months* and all within thirty months, may be illustrative of the difficulties. There, OMRDD was unable to place one hundred forty-four City TCF referrals in the agreed upon twenty-four month period. Seventy TCF referrals remained unplaced thirty months after the City had referred them for placement.[15]

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state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims."), the plaintiffs' failure to raise constitutional claims against the City in their litigation in state court foreclosed consideration of the City's constitutional liability. The State had, however, committed further constitutional violations against the plaintiffs subsequent to the conclusion of the state proceeding and thus res judicata did not bar holding it liable. *See Brooks I* at 1156.

[15] New York City made extensive efforts to force the State to honor its obligations to TCF clients through legal actions. In 1985, it brought suit against OMRDD for its failures "to plan for, develop and provide beds to mentally retarded and/or developmentally disabled persons referred by the City's Child Welfare Administration and mentally retarded hospital patients referred by [Health and Hospitals Corporation]." *City of New York v. Webb*, Index No. 40313/86, (Sup. N.Y. County), Stipulation and Order filed May 8, 1991. In 1991, that lawsuit was settled under an agreement in which OMRDD undertook to place 200 of 250 priority referrals from the City each year within a period of twenty-four months, and in no case to fail to place a priority referral within thirty months. Because OMRDD failed to meet even these gen-

The large numbers of individuals then involved may have required such an extended period, but a more recent agreement between the City and OMRDD also illustrates the actual time required to accomplish transfer from TCF placement to in-state placement, under more current conditions. The Memorandum of Understanding between OMRDD and the City, signed in January 1995, was intended to provide "orderly transfer" between TCF and the OMRDD system for the 108 individuals in TCF status for which OMRDD was responsible. The agreement provided the process that had been specified in the TCF statute: an offer of an appropriate available placement to the TCF recipient, the opportunity to challenge the proposed placement administratively before OMRDD staff members under Mental Hyg. L. §13.38 (the codified TCF statute.) *Id.* at 70. Also, the TCF statute mandated the preparation of a transfer plan for each adult by the discharging institution that "include[s] any information necessary to facilitate a safe transfer, such as specific problems, a schedule for administering medications and behavior unique to the individual." §7.38(f).

Before the appropriateness of an available institutional placement can be determined and a TCF recipient transferred, the constitutional standard established in *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984), *see infra* p. 25, must be satisfied. Determination of the appropriateness of a new placement and transfer, as with any other act significantly affecting mentally retarded persons who have been institutionalized with the approval and financial support of the State, must reflect the exercise of professional judgment. For example, in *Brooks*, OMH notified the TCF recip-

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erous time-frames in its commitment to the City (for example, the seventy priority referrals that waited over thirty months for placement), the City applied to State Supreme Court for an order of civil contempt against the State. In October 1995, Justice Collazo, although declining to order a finding of contempt against the State, ordered OMRDD to pay the City over $9 million for the costs of care borne by the City through September 1994 as the result of OMRDD's failure to comply with its agreement. That order is on appeal.

ients' "advocates" that their process would begin with an interview of the TCF recipient and evaluation of his or her clinical records by case management contractor or OMH staff.[16] Ethel Davis Jackson Ltr. dated February 27, 1995, *Brooks* Pltf. Ex. 7G.

Currently, OMRDD representatives have expressed a preference for a more cooperative, consultative and less formal (and adversarial) process than that provided in the statute and in the Memorandum of Understanding with the City: "It is the State's view of . . . this case that the formal offer of a placement followed by objection, by an opportunity to object and a hearing is a last resort kind of thing, really only useful if you want to look at it that way where you're trying to cutoff funding from someone who is, you know, who you're not C C who[se] expectation you're not meeting for whatever reason." Tr. at 20.

In any event, the process of determining what constitutes an appropriate placement for severely disabled persons like these plaintiffs must be a consultative one among the professionals at the State agency, the discharging facility and the proposed new facility and the 'advocate(s)' for the TCF client. These essential steps take time to accomplish.

To give some sense of what is involved, it may be instructive to compare the process required here to the much simpler, but not trivial, circumstance of the transfer of a nondisabled student from one college to another. First, the potential transferee's requirements must be determined and her qualifications documented, with transcripts and test scores and possibly letters of recommendation. Then, these requirements must be compared to available programs, a comparison that often involves a visit to the institution under consideration and discussion with the institution's staff of the match between the applicant's requirements and qualifications and the institution's offerings and requirements.

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16 Although none of the Suffolk County TCF recipients remaining at year end 1995 were OMH clients, Tr. at 14, the OMH letter to its *Brooks* plaintiffs provides a clear statement of process prescribed by State professionals in effectuating transfer.

If both the applicant and the institution agree about the match between offerings and requirements *and* the institution finds the applicant qualified *and* there is space available, then transfer can take place. If requirements and offerings do not match or if the potential transferee is not accepted or if no place is currently available, the search must resume. To shorten the time period it may be possible to proceed with regard to several colleges simultaneously. Ordinarily in a college transfer, the student and, often with her parents' assistance, conducts all her own investigation, as her and her parents' resources (possibly with help from the institution) will most likely finance it.

Here, where the State will pay the institutions' charges, the State must also be involved but the decision making process becomes exponentially more complex.[17] TCF clients are often multiply disabled, thus requiring particularly close attention to their specific and individual needs. Research must be undertaken and reports written. Furthermore, there are far greater limitations on availability of appropriate programs for transfer of TCF recipients than in the college transfer scenario because program needs are derived from the particular disabilities presented by the potential transferee and his or her treatment history. Because of the effort involved, applications are seldom pursued with more than one program at a time. Sometimes appropriate placement can be offered only at a future date. Moreover, parents or advocates have little ability to speed the process.

The TCF program was created in response to just this complexity in locating appropriate placements. In 1983, a subcommittee of the New York State Assembly conducted hearings and issued a report on "The Crisis in Transition," noting that the problem was created by "inadequate transitional planning and the scarcity of services for young adults." "Aging Out: The Crisis in Transition at Age 21 for Disabled

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[17] Charges for Suffolk County TCF plaintiffs in May 1995 ranged from $72,807 annually (three at The Woods School) to $127,549 for a plaintiff at the Benhaven Schooi. This cost, more than $6,000 to more than $10,000 per month, is beyond the means of most, if not all, the parents or advocates of these plaintiffs.

Individuals in Need of Adult Services," N.Y. State Assembly Subcomm. on Human Rights, January 14, 1983, at 2, Pltf. Ex. 7. "Nearly every speaker cited the difficulty in obtaining appropriate placements of their young adult clientele, *particularly the multiply-disabled*." *Id.* at 5. (Emphasis added.) It was then estimated that 1372 individuals would "age out" in 1985, 960 or 70% of whom would require residential placement. The eighteen individuals in TCF status[18] from Suffolk County when the County withdrew in 1995 must be placed against the context of the problem TCF was created to address, including the large numbers of persons "aging out" of educational placements, for whom in-state, adult placements were not available.

In fact, the State made progress in reducing the number of Suffolk County TCF recipients from 1989 to 1995. The number of Suffolk County TCF recipients grew from forty-four in May 1989 to fifty-two in 1990, but had been reduced to eighteen in November 1995, despite the annual additions of persons who 'aged-out' of education placements. *Id.* ¶23. As of March 1996, the number has been reduced to fourteen, with the State's placement of the four persons on the County's November 1995 list of TCF recipients who had "aged out" in July 1995. Abramowitz Ltr. dated March 8, 1996.

The problem for the plaintiffs before this court, as it was in *Brooks*, is that the funding ended before the process had been completed for *them*, through no fault of their own. For those that had aged-out in prior years, their continued TCF status indicates that their disabilities have been particularly difficult for the State to accommodate in in-state placements.

One thing this history certainly establishes is, that, while it may not require two to three years to accomplish the safe transfer of these fragile individuals, thirty-seven days is insufficient. Safe transfer cannot be, and could not be, accomplished in the thirty-seven days between the County's "official" notification of the termination of funding and its actual cut-off.

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[18] There were approximately sixty persons remaining in TCF status when New York City funding ceased in June 1995.

(2)

Dealing with the same problem in *Brooks I* and drawing upon Justice Blackmun's opinion for the majority in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), I wrote:

> Here, accurate determination of appropriate placement requires careful review of the plaintiffs' requirements and suitability of proposed placements. Failure to provide such review can lead to the forfeiture of the plaintiffs' interests in humane confinement.

908 F.Supp. at 1153.

The State has pointed out that a claim of deprivation of property without procedural due process must identify the protected property interest, citing *West Farm Associates v. State Traffic Commission*, 951 F.2d 469, 472 (2d Cir. 1991). The Second Circuit quoted *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972): " 'the nature of the interest [must be] one within the 'liberty or property' language of the Fourteenth Amendment.' " As this court has previously held, the TCF recipients' interest is a liberty interest in humane institutionalization, with conditions and changes determined with the exercise of professional judgment, not a property right or entitlement in any particular state statutory program. The Court of Appeals for the Second Circuit in *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (1984), following the Supreme Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982), has held that once the State made such individuals "dependent on the state, it was required to [house those voluntary residents] in a manner that would not deprive them of constitutional rights." *Good Will*, 737 F.2d at 1246.

In *Brooks I*, I used the analogy of a governmental program supporting dialysis, 908 F.Supp. at 1152, noting that: "[N]o one would seriously argue that the Due Process Clause does not impose an obligation upon a State or Congress to provide reasonable notice to dialysis recipients before terminating funding for those who have relied on that life-sustaining program, so as to allow them the opportunity to obtain alternate

access to treatment." These TCF recipients are adults who are incapable of functioning outside of the institutions in which they have resided for years, unless a myriad of support services are provided, if at all. Neither the State nor the County have disputed the necessity of plaintiffs' institutionalization.

Plaintiffs simply cannot make an abrupt transition from institutional life to life on their own, as would result from acceptance of the County's and State's arguments with regard to their non-responsibility. They also cannot make, without planning and support, any transition to another institutional placement that must be found and paid for from public funds. As previously explained, such planning and support cannot be accomplished overnight. It takes monthsCthe State of New York has, in fact, often taken years to accomplish such transitions under TCF. While the State's pace under TCF may not be a model, the history of the difficulty in finding placement for individuals with multiple disabilities in New York State demonstrates that this is not a matter that can be resolved in the thirty-seven day period the County allowed for making the necessary transition after it notified the State, the schools and the plaintiffs on November 24, 1995, following its adoption of its 1996 budget.

Where such liberty interests as those of the plaintiffs are implicated under the Fourteenth Amendment, state actors, including both the State and the County, are obligated to exercise professional judgment in their actions affecting those interests. In *Brooks*, drawing upon the decisions in *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984), this court held that "due process, at a minimum, requires a 'do no harm' standard. . . . [T]he State is obligated to exercise professional judgment to find, and professionally plan transition to, suitable facilities for the individuals still in out-of-state placements." 908 F. Supp. at 1151.

In *Brooks*, this court, also, found an Equal Protection violation in the State's refusal to fund TCF recipients in out-of-state facilities because of its determinative role, both in the plaintiffs' original placement, and in their continuing place-

ment, out-of-state.[19] The State materially assisted in creating the very distinction that then formed the basis for its discrimination in funding while the placements of other persons similarly situated *within* the state are fully funded.[20] *Brooks v. Pataki I*, 908 F. Supp. at 1154.

(3)

There is no question that the State is responsible for these individuals in whose original *and* continued institutionalization it played so material a role. The Second Circuit, in *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1246 (1984), held that constitutionally protected liberty interests were implicated in the institutionalization of the mentally retarded even under voluntary commitment. Nonetheless, the State continues to argue that it has no federal constitutional responsibility to persons voluntarily committed to its care. *See* Abramowitz Ltr. dated March 8, 1996. This view, based heavily on *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), not only believed by this court to be an unwarranted extension of *DeShaney* to institutionalized persons, but also fails to acknowledge that the plaintiffs' placements are not necessarily to be regarded as "voluntary."

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[19] The issue of a possible violation of the Commerce Clause in the discrimination against adult state residents placed in out-of-state institutions has not been raised here, and would probably be foreclosed by the State's right, when acting as a market participant, to discriminate against out-of-state providers. *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (Boston could impose a resident hiring requirement on contracts it funded in whole or in part) and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (Maryland could refuse to buy scrapped automobiles from Virginia processors while purchasing from Maryland processors).

[20] It should be noted that the State's refusal to fund out-of-state placements does not appear to result from budget pressure C Paul Kietzman of OMRDD stated, in *Brooks*, "I don't think it has to do with the cost to the State, to the State government. I don't think any analysis of that was done." *Brooks* Tr. at 72.

It is true that plaintiffs were placed voluntarily by their parents and local school boards, with the specific approval of the State Department of Education, but they are now adults who have not given consent and are, in fact, incapable of doing so. A voluntary placement does not necessarily retain that character permanently in the face of intervening changes. The Eighth Circuit, in *Kennedy v. Schafer*, 71 F.3d 292, 294 (8th Cir. 1995), stated: "We see no reason why a patient originally committed voluntarily must retain that status permanently. Facts change, and legal status follows facts." That court suggested that a reasonable test for testing whether someone is a "voluntary" patient is whether the patient "had the absolute right to leave the hospital by simply requesting to be released." *Id.* at 295.

As a result of their own disabilities, plaintiffs here have no freedom to act in their own behalf. They certainly would not be released if they simply asked to be released. The State-Cignoring the irony of the argumentChas several times pressed its view that this court would be justified in issuing orders to restrain the *private* institutions at which plaintiffs reside from simply discharging them to another institution or a home-health care arrangement without developing an appropriate discharge plan. Tr. at 38-39. *Brooks* Tr. at 220-22.

Other facts that have changed and affected the plaintiffs' legal status after their original placement are their attainment of adult status at age twenty-one and a change in the governmental entities responsible for them. While plaintiffs were in educational placement before they became twenty-one, their local school district and the State were responsible for the costs of their institutionalization. Once the end of the school year in which they became twenty-one was reached they came under the aegis of TCF and, in the case of the Suffolk plaintiffs, they became the responsibility of OMRDD and Suffolk County. Both governmental entities are thereby constitutionally responsible for their continued institutionalization.

(4)

The State's assumption of responsibility for the plaintiffs was explicit. The OMRDD Long Island DDSO director and deputy director have attributed far greater responsibility to that agency in letters to parents than has been acknowledged by the State in this litigation:

> If [your daughter] has not been placed in an adult residence by the end of the school year, *our office will apply* for transitional funding so that she can remain in her current setting until an adult placement is secured. . . . To qualify [for TCF], an individual *must* be deemed appropriate to receive services from OMRDD and *must* reside in a program approved under Social Services or Education Law. Transitional funding is administered by the N.Y.S. Department of Social Services with voluntary participation by individual county social services departments.

Pltf. Ex. 14, Ltr. dated February 5, 1991 from Ira Zimmerman, Deputy Director, Community Services, Long Island Developmental Disabilities Service Office (DDSO) to parents of Lora Jane Hoops. (Signature page of letter misbound in Ex. 15.) (Emphasis added.)

> With the passage of [the TCF statute] comes specific responsibilities for [OMRDD]. One responsibility is to offer appropriate and available placements in the OMRDD adult care system within the state for young adults who have aged-out of the educational system or social services system.

County Ex. G, Colson Ltr. dated December 4, 1995 to Lenzo. Plaintiffs' eligibility for TCF was conditioned upon State eligibility for institutional services, State approval of the facility in which they resided (at which their acceptance was originally conditioned on State approval, as the cost, now $75,000-130,000 per year, is beyond the means of most families), and their cooperation with State efforts to find adult placements within the state. The State administered the funds

that paid, initially half, and subsequent to July 1, 1995, sixty percent, of their cost of care.

The County has asserted that State DSS procedures, from the outset of TCF in 1983, "call for OMH/OMRDD to be the case managers while holding the [locality] responsible as financial managers." Kelsch Aff. dated February 23, 1996 ¶ 25.

This court does not question the constitutionality of a political entity's withdrawal of services previously provided to its citizens. The State has the right under the federal Constitution, as well as under state law, to terminate the TCF program. But, whether categorized as a constitutionally protected liberty interest or a pure procedural due process claim, the State does not have the constitutional right to withdraw from the TCF program without providing the essential due process needed C which in this instance means reasonable notice that would permit the making of alternative arrangements. The functioning levels and even the very lives of these plaintiffs are at stake in ejection from placements without the exercise of professional judgment in planning for post-ejection circumstances. The State's eagerness to impose this duty on the institutions that currently care for the plaintiffs, on grounds that the institutions are state actors, while it disputes its own responsibility, tacitly recognizes the necessity for this planning, while denying the financial support that is essential.

(5)

Although it came to its responsibilities later in the plaintiffs' placements than did New York City in *Brooks*,[21] the County does not dispute its extensive involvement in the administration of TCF. It does not claim to have been a passive funding source, but rather claims that it has merely exer-

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[21] The County was responsible for the original TCF placements of only one plaintiff. The County became responsible for the other plaintiffs only when they "aged out" of educational placements arranged by local school boards, assuming a responsibility previously that of a local school district within the county.

cised the County's right under State law to withdraw from TCF. It asserts that the warning letters from the County DSS Commissioner in the summer of 1995 were more than adequate notice to the parties that it would withdraw, if it had any duty to warn.

The County details its diligence in oversight of the TCF program. It followed up to assure that the responsible State agency (OMRDD or OMH) made efforts to obtain suitable placements. *Id.* ¶ 27. It executed contracts with the institutions in which the TCF recipients resided, using rates promulgated by the State Departments of Social Services and Education. Kelsch Aff. dated February 23, 1996 ¶ 20. The County has sought to modify the program, by its own report obtaining, in 1991, "Suffolk-only procedures" that require that "all of the individual's assets and resources (not just SSI) be applied to the cost of care, that an application for Services (DSS 2921) be filed, and that application for recertification be made every six months." *Id.* ¶ 28. However, unlike New York City, Suffolk County has never sought judicial assistance to force the State to expedite its transfers of the TCF recipients nor did it attempt to negotiate a phase-out period with the State.

The County has been understandably frustrated by the seemingly glacial pace of the State's assumption of its responsibilities regarding persons in TCF. The financial disincentive to the State offered by a program in which it, until July 1995, paid only halfCand the agencies involved, noneCof the TCF recipients' costs of care,[22] while alternative placements would be charged totally to the agency, may have helped to make a difficult task even less appealing to the state agencies.

The Suffolk County Executive has, however, attempted to eliminate TCF from the County Budget at least four times (and possibly six times, if plaintiffs' accounts of 1988 and 1992 efforts are correct), but, until November 1995, never actually did so. In 1989 and 1990 and twice in 1995, the

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[22] Until at least 1995-96, the TCF reimbursement of localities was funded in the budget of the State Department of Social Services rather than in the budgets of its subdivisions, OMRDD and OMH. Budget Memo at 112, *NYCEP* Record on Appeal.

County DSS threatened to cut-off funding for all or part of the program. The first three efforts were rebuffed by the County Legislature. Only on the fourth attempt, with the County's credibility undermined by the abortive earlier attempts, did County DSS actually cut off funds. (As noted, plaintiffs have averred that there were unsuccessful attempts in 1988 and 1992, as well, that were also thwarted by the Legislature.)

These unsuccessful efforts support the conclusion that County DSS has cried "Wolf!" too often to be taken seriously prior to adoption of the County Budget in November 1995. Prior to County DSS Commissioner Wingate's November 24, 1995 letter giving "official notice" to the State that the County Budget for 1996, as adopted, omitted TCF, County DSS had provided notice to the State and to the plaintiffs only that it would, once again, *attempt* to cut off TCF funding. In view of its lack of success in its prior three (possibly five) efforts, and with no further communication undertaken to distinguish this effort from the previous ones, the July 1995 notice cannot be found to be effective notice to either the State or the plaintiffs. This finding is based on Commissioner Wingate's July and November 1995 letters, County Ex. A-E, which, as the County has repeatedly urged, speak for themselves. Tr. at 44, Sklar Ltr. dated March 13, 1996.

Commissioner Wingate's November 24, 1995 letter provided the first "official notice" to the State that eighteen individuals, fourteen of whom had "aged out" prior to 1995, would not be covered by County TCF funding only five weeks later. Neither unilateral action by the County DSS Commissioner in describing his budget plans nor by the County Executive in proposing the budget nor by legislators writing to state officials constitutes the "action" of the County. The State *could* have taken notice of the Executive's intentions as expressed in May and July 1995, but it was not obligated to do so. The past history of the County Executive's attempts to withdraw had taught both the State and the plaintiffs that it was not *over* until it *was* over. The State appears to have given roughly the same importance to the County DSS Commissioner's July notice of intent to withdraw from TCF

as it has given to that it received in February 1996 from the Presiding Officer of the Legislature announcing the efforts in the Legislature to restore TCF funding. Both are unilateral actions by a branch of County government with respect to a matter that requires adoption by both branches to become an act of the County.

(6)

The due process obligation of the County is not unlimited. The County's role in TCF was that of financial manager, clearly a lesser role, while the State was responsible for case management. The extent of the County's constitutional obligation to TCF recipients is thus also more limited than is that of the State. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell v. Burson*, 402 U.S. 535 (1971).

The actual conduct of the County and the State with regard to the eight persons who "aged out" of educational placements as of July 1, 1995 indicates a period of transition from local to State responsibility reasonably related to each entity's role. There, despite having given notice to all parties that it would not do so, the County funded new TCF intakes from July 1, 1995 to the earlier of their placement or December 31, 1995, a six month period. There were eight on the County's May 1995 list and four of these new intakes to TCF were on the County's November list. The State has represented, in March 1996, that it has placed all of eight of the 1995 TCF intakes. This means that, in a period of about eight months, it has been able to place the eight Suffolk County TCF recipients who aged out in 1995 in State approved and funded in-state programs. Abramowitz Ltr. dated March 8, 1996.

There is a marked contrast between the precipitous termination of funding by the County at the end of 1995, with only five weeks notice and no effort to facilitate transfers with the six months the County provided, albeit only after threatening to exclude them, for placement of the 1995 new intakes. The November 1995 action of the County also compares unfa-

vorably with the serious TCF phase-out efforts undertaken by New York City, which negotiated a memorandum of understanding with OMRDD and extended a fixed amount of funding for up to six months to assist in obtaining placement of the affected individuals. The County's notice to the State is the critical factor because only the State is able to arrange for the placement of these individuals in State-approved facilities. Failure on the part of a TCF recipient to cooperate with State placement efforts has long been grounds for termination from the program.

(7)

"The purpose of a preliminary injunction is to preserve the status quo pending the final determination of a dispute." *Arthur Guinness & Sons, PLC v. Sterling Publishing Co., Inc.*, 732 F.2d 1095, 1099 (2d Cir. 1984); *see, e.g., JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75 (2d Cir. 1990). Plaintiffs have met the well-settled standard for a preliminary injunction:

> The standard in the Second Circuit for injunctive relief clearly calls for a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigating and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

The absence of professional judgment in the abrupt end of Suffolk County's TCF funding demonstrates the existence of "sufficiently serious questions going to the merits" of the alleged constitutional violation to satisfy the first part of the second prong of the standard with respect to the County as well as the State. This makes a fair ground for litigation with a real possibility for success on the merits. *Medical Society v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). The balance of hard-

ships certainly tips toward plaintiffs, whose very functioning is threatened, as opposed to the incremental cost to the County and, if placement is not completed in six months, also to the State, for a true transitional period where, using professional judgment, effort is made by the State to determine, locate and effectuate transfer of plaintiffs to appropriate available placements.

The appearances by a representative for The Woods School, here and in *Brooks*, has again brought to the Court's attention the critical problem faced by the private organizations currently caring for the plaintiffs. The Woods School has not received payment on behalf of the Suffolk County TCF recipients since County funding was discontinued in January 1996. The Woods School and the other institutions are now confronted with a conflict between their ability to care for these individuals and their duty to protect the financial health of their institutions which directly impacts upon their ability to serve others. Both Woods and Devereux, another school serving New York TCF recipients from both Suffolk County and New York City, have already suffered substantial losses from the gap in funding for City placements in the period from June to mid-November 1995 and, thus, are in a weaker position to subsidize the State and County than they were when the City withdrew.

Moreover, the prospect of irreparable harm is " 'not remote or speculative but . . . actual and imminent.' " *Jackson Dairy, Inc.* at 72 (quoting *New York v. Nuclear Regulatory Comm.*, 550 F.2d 745, 755 (2d Cir. 1977)). The harm that will be caused to these severely disabled persons by a hasty transfer as the institutions discharge plaintiffs, which they will inevitably be forced to do if funding is not restored, certainly cannot be repaired by money damages. The balance of hardships tips unquestionably in the direction of the plaintiffs. The State's suggestion, both here and in *Brooks*, that these institutions be enjoined to retain their TCF residents without any funding or commitment to expedite transition from the State, may threaten the very existence of these institutions. Tr. at 38-39, *Brooks* Tr. at 220-22. This is particularly mean-spirited

treatment for institutions that have been the only ones able to care for TCF recipients when the State could find no other institutions to accept them.

Suffolk County and the State of New York share responsibility for the care and maintenance of these seriously impaired individuals. Suffolk County is entitled to terminate its TCF participation, but it must do so in a way that comports with the Due Process Clause, giving TCF beneficiaries time to obtain alternative care. The State is the entity ultimately responsible under the federal Constitution for the accomplishment (or failure) of any transition to adult placements in a manner that satisfies due process standards.[23] As Judge Brieant held in earlier litigation concerned with severely disabled children:

> A disruption of [these] lives, such as that which would be caused by an abrupt change of [facilities], would be likely so to disturb these [individuals] that many skills, acquired after time and great effort, would become unlearned and lost. Many have been transferred before; shuttled from pillar to post . . . At least during the pendency of this lawsuit, such irreparable injury . . . must be avoided.

Stanger v. Ambach, 501 F. Supp. 1237, 1243 (S.D.N.Y. 1980).

This concern was echoed in the legislative history for the TCF statute: "the potential for serious disruptions in care for these young adults, who have less tolerance for disruption than most others in our systems of care, remains higher than is warranted." Memorandum of State Executive Department, re: the 1994 TCF proposal, attached to *NYCEP* Record on Appeal, Ex. G.

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[23] The State litigation has determined that the County is entitled to terminate its participation in the TCF program. *NYCEP*, No. 102684/95 (Sup. Ct. N.Y. County 6/13/95), *aff'd*, 632 N.Y.S.2d 531, 1995 WL 592885 (App. Div. 1st Dep't 1995).

(8)

The County and the State object to the grant of a Preliminary Injunction without an evidentiary hearing. Abramowitz Ltr. dated March 8, 1996, Sklar Ltr. dated March 13, 1996. The Second Circuit has, however, held, in *Drywall Tapers and Pointers v. Local 530*, 954 F.2d 69, 76-77 (2d Cir. 1992) (brackets in original):

> Although a hearing is generally required on a motion for a preliminary injunction, "*Fengler* does not stand for the proposition that hearing must be held in all preliminary injunction cases." No hearing was necessary here because "the prior hearings and affidavits, and the court's findings supporting the earlier injunction, provided an adequate basis for the court's decision. The most significant factors [on which the injunction was based] . . . would have remained essentially unchanged by any additional evidence."

Quoting *Republic of Philippines v. New York Land Co.*, 852 F.2d 33, 37 (2d Cir. 1988) citing *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745 (2d Cir. 1987).
No evidentiary hearing is required here because the documents submitted by the County, as it requested, "speak[ ] for themselves." Sklar Ltr. dated March 13, 1996, Tr. at 44.

The County's affidavit and chronology of 1995 TCF budget actions have been relied on by the court in finding that effective notice of withdrawal from TCF to plaintiffs and the State for due process purposes was provided only in late November 1995 after the County adopted its 1996 Budget and gave "official notice" of its withdrawal. County Ex. E.

The raison d'etre of TCF was the need for time for transition. The entire history of transitional care clearly establishes that five weeks was an inadequate period in which either plaintiffs or the State could act to protect plaintiffs' liberty interest in institutional conditions determined by the exercise of professional judgment. The parties have amply briefed and argued the history of the Transitional Care Funding program here, both directly and by reference from *Brooks*. The defen-

dants' dispute with my ruling is based on its conclusions of the law, not of my factual findings.

Here very little "turns on [disputes about] what happened." Were that not true, the holding that " 'where everything turns on what happened and that is in sharp dispute; in such instances, the inappropriateness of proceeding on affidavits attains its maximum.' " *Forts v. Ward*, 566 F.2d 849, 852 (2d Cir. 1977), quoting *Dopp v. Franklin National Bank*, 461 F.2d 873, 879 (2d Cir. 1972), quoting *Securities and Exchange Comm'n v. Frank*, 388 F.2d 486, 491 (2d Cir. 1968) would clearly mandate a hearing. This principle is, however, simply inapplicable here.

Moreover, the County's position is disingenuous. On the one hand, the County protests against the State's submission of a letter from the Presiding Officer of the Legislature to an OMRDD official, arguing that it is not bound by such a letter. Sklar Ltr. dated March 13, 1996. Yet, at the same time, the County is arguing that the State should have assumed that the County was serious when it announced its withdrawal in the equally non-definitive letters of the County DSS Commissioner in May and July 1995. Even if the State officials seriously believed the County Executive was in earnest, they, too, based on the repeated history of the Executives efforts to end the program, appropriately awaited action by both governmental branches. They awaited, as the County asserts they should have, "the will of [the] legislature." *Id.*

Official acts of the County Executive and the County Legislature, disputed by no party, are the basis for this order to Suffolk County. Similarly, the undisputed history of joint State and County involvement in TCF and State responsibility for case management provides clear support for dividing responsibility for phase-out of TCF between the two levels of government while placing ultimate responsibility on the State if it fails to complete transition during that phase out period. The circumstances, therefore, fully satisfy the requirements for issuance of a preliminary injunction.

Conclusion

The court grants the plaintiffs' motion for a preliminary injunction, orders Suffolk County to resume funding the TCF recipients' placements, including arrears to January 1, 1996, for a period of six months from the date of this order, so as to provide TCF recipients and the State the opportunity to arrange alternative care in an orderly manner. The State has represented that it will honor its commitment under TCF to reimburse the County for sixty percent of the cost. Tr. at 43-44. The State is ordered to use all good efforts, using professional judgment, to assist the plaintiffs in obtaining appropriate alternative care. The State will assume the burden of funding any remaining TCF placements at the end of this six-month period. Failure of any plaintiff to cooperate with reasonable requests related to developing placement plans or to accept an appropriate placement, shown by the State or County to the satisfaction of this court, is grounds for termination of the interim funding for that individual under this order.

Dated: Brooklyn, New York
April 2, 1996

SO ORDERED:

/s/ DAVID G. TRAGER
David G. Trager
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-96-0288 (DGT)

SUFFOLK PARENTS of HANDICAPPED ADULTS; and IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE, and RICHARD ROE, as parents and guardians of, respectively, LORA HOOPS; ANDREW GATLAND; JAMES SENSALE; LOURDES ARON; GLENNA HAMID; KAREN DEVOE; JOHN DOE, and RACHEL ROE,

Plaintiffs,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE; BRIAN WING, and JOHN B. WINGATE, as Commissioners of, respectively, the New York State Office of Mental Retardation and Developmental Disabilities; the New York State Office of Mental Health; the New York State Department of Social Services, and the Commissioner of the Department of Social Services; and SUFFOLK COUNTY,

Defendants.

MEMORANDUM AND ORDER

TRAGER, *District Judge*:

This action was brought by four profoundly disabled and medically fragile adults, who have been institutionalized under joint State-local programs for many years, most recently under a program called Transitional Care Funding (TCF). The TCF program was developed to provided a bridge between educational placements of severely disabled persons in residential programs and long-term adult residential care after these persons became adults or, as it is called, "aged-out" of educational placements at the end of the school year in which they became twenty-one. This suit results from an unfortunate dispute between the State of New York and Suffolk County concerning the funding of the TCF program.[1] The rights of plaintiffs under the federal Constitution have been gravely imperiled as the result of Suffolk County's precipitate termination of its funding of the TCF program in late November 1995, effective December 31, 1995.[2]

Accordingly, on April 2, 1996, a preliminary injunction was issued, ordering "Suffolk County to resume funding these persons' institutional placements, including arrears to January 1, 1996, for a period of six months from the date of the order, so as to provide TCF [Transitional Care Funding—the State-local program] recipients and the State the opportunity to arrange alternative care in an orderly manner." In addition,

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[1] In *Brooks v. Pataki*, 95-CV-2902, 908 F.Supp. 1142, 1144-45 (E.D.N.Y. 1995), a related case concerning TCF recipients who are residents of New York City, an extended discussion of the history of the TCF program is provided.

[2] The court's opinion in this case, dated April 2, 1996, *Suffolk Parents of Handicapped Adults v. Pataki*, ___ F.Supp. ___, 1996 WL 173024 (E.D.N.Y. April 2,1996), sets forth in detail the basis for this finding. *See Suffolk Parents*, n.3, for a description of the current status of plaintiffs Hamid and Sensale, who were unaffected by the decision granting a preliminary injunction.

the State defendants[3] were ordered to use all good efforts, employing professional judgment, to assist plaintiffs in obtaining appropriate alternative care and to assume the burden of funding any TCF placements when Suffolk County's obligations under the order would expire at the end of the six month period.

By letter dated April 8, 1996, Suffolk County, John Wingate, Commissioner of Social Services, and Robert Gaffney, County Executive (County defendants), have requested a stay of the injunction pending appeal. The County defendants also submitted a supersedeas bond in support of their request for the stay of the order to pay plaintiffs' existing arrears. Plaintiffs have submitted a letter in opposition to the County's request. The State defendants' representatives have declined to reply. The representative of the non-profit school, at which three of the four plaintiffs reside, has submitted an affidavit detailing its monthly costs and the total amount in arrears. The County, by letter dated April 12, 1996, has submitted a reply to plaintiffs' response and also an amended motion, adding the County Executive, Robert Gaffney, to the list of movants.

By letter dated April 18, 1996, plaintiffs have requested that a "corrected opinion" be issued indicating that, should the County prevail on appeal, the State would bear full responsibility for plaintiffs' care. The State has submitted a reply, dated April 23, 1996, opposing this request.

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[3] The object of the injunction previously granted is hereby clarified to refer to the named State defendants, George E. Pataki, Thomas A. Maul, James L. Stone and Brian Wing, rather than the "State." This complies with "the doctrine of *Ex parte Young*, [209 U.S. 123 (1908)] which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, [and] is regarded as carving out a necessary exception to Eleventh Amendment immunity [a state's immunity from suit in federal court]. . . . [T]he exception is narrow: it applies only to prospective relief . . . and has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993).

For the reasons stated below, the County's request is granted in park and denied in part, and the order is clarified to make explicit the court's view that, should the County prevail on appeal, the State is fully liable for plaintiffs' care from April 2, 1996, the date of the order.

Discussion

The controlling text for whether a stay should be granted places a heavy burden on the movant. The Second Circuit has stated it as follows:

> A party seeking a stay of a lower court's order bears a difficult burden. We consider (1) whether the movant will suffer irreparable injury absent a stay; (2) whether a party will suffer substantial injury if the stay is granted; (3) whether the movant has established a substantial possibility, which need not be a likelihood, of appellate success; and (4) the public interest.

United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc., 44 F.3d 1082, 1084 (2d Cir. 1994) citing *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1992).

The first through third components of this test closely correspond to the test that was applied in determining that plaintiffs were entitled to an injunction. *See Suffolk Parents v. Pataki*, ___ F. Supp. ___, 1996 WL 173024, *15 (E.D.N.Y. April 2, 1996). In addressing the stay, of course, the County's claim that it will suffer irreparable harm becomes a primary focus. In addition, the test for a stay requires consideration of the public interest.[4]

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[4] The County claims, in its April 12, 1995 letter, that plaintiffs have asserted that the law of the case, *Brooks v. Pataki*, at the Second Circuit denying a stay, governs its request for a stay. The court does not find such a claim in plaintiff's papers and, if there is such a claim, the court agrees with the County that it is not valid. The court views plaintiffs' submissions from *Brooks v. Pataki* as relevant because of the parallels between the cases. There are, also, as the County urges, and as the

1. Irreparable Harm to Movant Absent a Stay

The County argues that it will suffer irreparable harm through its inability to recoup the funds should it prevail on appeal, thereby "depriv[ing] some other program of budgeted funds." The argument is not without some merit, for public funds are certainly not limitless, nor is it the role of the judiciary to determine how they should be distributed. However, the role of the judiciary to review executive and legislative actions and to protect the rights of persons unable to protect themselves from unconstitutional governmental intrusion has also long been recognized. It was recognized, in fact, in the very decisions upon which the finding was based that the County violated plaintiffs' constitutional right, *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984).

In its letter, the County presents a distorted picture of the actual financial impact of the preliminary injunction on the current arrears for the four plaintiffs, which it asserts are $88,297.84. That figure represents the full cost of institutionalization, but the State will reimburse the County for sixty percent of that cost. Thus the actual, final cost to the County of the arrears will be $35,319,14. The ongoing cost, per month, for plaintiffs is $11,773 after reimbursement by the State. The total cost to Suffolk County for the care of the four plaintiffs for both arrears and a six month phase-out period combined, assuming that *none* of the plaintiffs is placed by the State in the interim, will be $105,957.

Further, although it is not a factor in this decision, it is difficult to accept the assertion in the stay application that the County, because of its "line-by-line, item-by-item budget" is unable to absorb the approximately $106,000 that is the maximum cost to the County from this order after sixty percent reimbursement by the State. Acceptance of the County's

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Court noted in its decision granting the preliminary injunction, difference between the situations.

assertion of inability to absorb the cost requires one to assume that the $1.6 billion Suffolk County 1996 budget[5] is predicted accurately to its last $100,000, that is, to less than one-hundredth of one percent of the total budget, and, even more significantly, requires one to assume also that the budget contains no allowance for contingencies.

There is no dispute with regard to the following facts: first, budgeted and unexpended State Transitional Care Funding (TCF)[6] intended for Suffolk County residents are available that will reimburse Suffolk County for sixty percent of its phase-out costs. Second, the State's commitment, in the long term, to providing care for plaintiffs is also not in dispute. Finally there is no *real* dispute about the necessity of institutionalization of plaintiffs, although, as is discussed, infra at 9, the County has, in its request for a stay, for the first time, sought to inject a question as to plaintiffs' need for care.

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[5] *Newsday*, November 21, 1995, A 7, noting the approval by County Executive Gaffney of the $1.6 billion 1996 budget on November 20, 1995.

[6] Transitional Care Funding for residential placement of disabled individuals who have "aged out" of educational placements was first included in the State budget in 1982, as a part of the Aid to Localities Budget. From April 1982 to July 1995, the State budget provided fifty percent reimbursement of local expenses for care of mentally and developmentally disabled adults who as children had been placed in residential schools and institutions by local school districts with the approval of the State Department of Education. There was, however, no corresponding authority for transitional care in substantive law until the Transitional Care Statute was enacted in 1994. Legislative History: Assembly Mem., *New York Council for Exceptional People v. Pataki (NYCEP)*, Record on Appeal to the App. Div., 1st Dep't, at 104.

In 1994, legislation was adopted (the TCF Statute) increasing the State's share of transitional care costs to sixty percent as of July 1, 1995, and establishing a timetable for the phase out of transitional care to eliminate intake to TCF in 1996 and provide for full state funding as of 1999. 1994 N.Y. Laws, Ch. 600. The statute permitted discontinuation of transitional funding only after "an appropriate, available adult placement or adult services" was offered and, if not accepted, had been upheld as appropriate by an administrative hearing or the period in which to request administrative review had expired. *Id.* § 466-5(a).

The 1995-96 State budget already contains funds for sixty percent of the costs of the arrears for plaintiffs' institutional care. None of these funds, budgeted to pay for out-of-state placements, has been used for the benefit of plaintiffs from January 1 to the date of the order, a period of three months. Further, the State has represented that it will reimburse the County for TCF payments it makes. Tr. at 31, 44. From the efforts at placement on which counsel for the State Office of Mental Retardation and Developmental Disabilities (OMRDD) reported at the hearing, the State appears to be committed to offering and providing appropriate in-State placements. Tr. at 15-19. The State reported in its March 8, 1996 letter that it has placed all eight Suffolk County TCF recipients who "aged out" of their educational placements in July 1995, including one of the two original plaintiffs in this suit.

These facts demonstrate a modest and limited financial hardship for the County for the ongoing placement costs of plaintiffs and arrears. The County's obligations will be satisfied six months after the date of the order, at which point the State will assume full responsibility for any TCF recipients still unplaced or not otherwise discharged under plans evincing the exercise of professional judgment.

2. Substantial Injury to Non-Moving Party if Stay Granted

It is important to understand just how profoundly disabled plaintiffs are. TCF recipients are not likely candidates for deinstitutionalization. For instance, plaintiff Lora Hoops, aged twenty-five, diagnosed as functioning in the profound range of mental retardation, with cerebral palsy and a seizure disorder, has been at The Woods School, in Langhorne, Pennsylvania, since she was placed there by a Suffolk County local school district nineteen years ago, at the age of six. Pltf. Mot. Hoops Aff.

Until its application for a stay, the County did not question the serious nature of these plaintiffs' disabilities. However, as

noted, the County, in its letter dated April 8, 1996 requesting a stay, raises the issue that "there is no proof *in the record* that plaintiffs will be harmed even if they are discharged and returned to the care of their parents or guardians." (Emphasis added.) The County fails, however, to provide—or even suggest that there exists—any proof in *its* extensive records of these plaintiffs' conditions that makes this an even colorable claim. These plaintiffs were long known to the County. The County made no assertion that plaintiffs were ineligible for TCF at any time during its administration of the program,[7] despite the powerful financial incentive it had to do so. Nor did the County raise the point in earlier papers or in the hearing on the motion for a preliminary injunction, although specifically asked by this court whether there was a need for a hearing on any factual issue. Tr. at 44-45. In other words, at a time when plaintiffs would have had an opportunity to respond, the County said nothing. The interposition of this objection at this time leads to the conclusion that it is not only belated, but is not made in good faith.

Significantly, to accept that there is substance to the assertion would require a disregard of the evidence presented by the County's own correspondence (that it urged "spoke for themselves") and the affidavits it submitted. For instance, Paul Kelsch, Assistant Division Administrator in the County Department of Social Services for eleven years, averred his familiarity with TCF, noting that one of the County's roles with respect to TCF recipients was "to determine initial eligibility." Kelsch Aff. dated March 13, 1996. Commissioner Wingate's letter to care-providers on November 24, 1995 stated: "We have notified the parents of the individual involved and we have urged OMRDD to redouble their efforts to locate or develop the *much needed* adult facilities." County Ex. D. (Emphasis added.) Other County correspondence con-

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[7] The County has administered plaintiffs' TCF benefits for nine and one-half years (Gatland), eight and one-half years (DeVoe), four and one-half years (Hoops) and eighteen months (Aron). Kelsch Aff. ¶5 dated March 13, 1996.

nected with the program contains similar assertions. *See* County Ex. A (Ltr. to parents): "The fact that Suffolk County can no longer [pay for TCF] does not mean a disruption in the continuity of care for [your child]. . . . Urge [OMRDD] to find or develop what is long overdue—appropriate adult facilities for all those who aged out of residential care;" Ex. B (Ltr. to State officials), July 1995: "locate appropriate adult facilities for this population in the next five months;" Ex. C (Ltr. to parents), November 1995: "We are hopeful that the fact that Suffolk County can no longer cover the cost of Transitional Care . . . will not mean a disruption in care for your child;" Ex. E (Ltr. to State Officials), November 24, 1995: "We are at this time advising OMRDD, . . . of the need for OMRDD/LIDDSO (Long Island Development Disabilities Service Office, the local OMRDD office) to locate suitable adult facilities for this population."

Further, Suffolk County, by its own admissions, had extensive contact with the plaintiffs during its administration of the TCF program. Plaintiffs' TCF status was effective only through compliance with County and State procedures, a process the County noted that it had seriously pursued it duties in connection with the program:

> Suffolk County has taken its [TCF] responsibilities seriously and its staff follows up regularly when [State agency] reports are vague or overdue. . . . [The County established procedures to ensure control of the program that became effective June 1, 1991.] The procedure included provisions . . . that an application for Services (DSS 2921) be filed, and that application for recertification be made every six months.

Kelsch Aff. dated February 23, 1996.

Although the County objects to the finding that the cost of the adult plaintiffs' placements is beyond their means, it presents no evidence that it is not, despite certain knowledge of plaintiffs' means because of its procedures insuring that "all of the individual's assets and resources (not just SSI) be

applied to the cost of care . . . " Kelsch Aff. dated February 23, 1996 ¶ 28.

In sum, nowhere in any of the County's submissions, prior to its April 8th letter, is there the slightest suggestion that these four plaintiffs could simply leave the facilities at which they reside without harm. Rather, they establish the contrary. Moreover, the County's argument would also have the court disregarded or re-invent the extensive TCF legislative history, incorporated here by reference from *Brooks v. Pataki*,[8] as well as that submitted by plaintiffs here, as Pltf. Ex. 7, that document the program and the nature of the disabilities possessed by its beneficiaries. Former Governor Mario Cuomo described the TCF recipients as "medically fragile or highly behaviorally disturbed adults" in his message accompanying his approval of the statute in 1994. *New York Council for Exceptional People v. Pataki (NYCEP)*, Record on Appeal to the App. Div., 1st Dep't, at 101.

It is unquestionable that, until individual discharge/transfer plans developed with the exercise of professional judgment have been formulated, retaining the status quo with respect to plaintiffs' current placements is the only way to provide the process that is due to protect plaintiffs' liberty interests in safe conditions and freedom from undue restraint, pursuant to *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1246 (1984).

Counsel for The Woods School, at which three of the four plaintiffs reside, recounted the "severe problem" faced by his client at the hearing on March 6, 1996. "[I]t is very important that the Court understand that my client, as a result of its patience, sustained a loss of over three hundred thousand dollars which it has not recouped under *Brooks v. Pataki* and quite frankly I'm here today because my client literally wants to know immediately what is to happen vis-a-vis the Suffolk

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[8] 95 CV 2902, decisions reported as 908 F.Supp. 1142 (granting injunction) and 908 F.Supp. 1157 (denying State's request for a stay).

clients." Tr. at 37-38. Subjecting these non-profit institutions, which cared for New York State residents so severely disabled that no institution in New York State would take them, to unlimited liability for care for these individuals, as both the County and the State have urged, gives fresh meaning to the old saw, no good deed shall go unpunished. Balancing the very lives and functioning of these fragile individuals against a relatively modest and limited incremental cost to the County weighs markedly against granting a stay.

3. Movant Has Substantial Possibility of Success on Appeal

The County argues that it will prevail on appeal because this court impermissibly used "the due process clause to nullify governmental acts . . . believe[d] to be unwise or incompatible with some particular social philosophy." The County also asserts it will prevail on appeal because the injunction was based on a legal argument that reliance created by the County's communications estopped the County from withdrawing. In addition, the County argues that the order, as it related to the arrears for care of plaintiffs, constituted a mandatory injunction, representing partial summary judgment in favor of plaintiffs. Finally, the County repeats its arguments that the County defendants were not fully heard, specifically referring to the lack of a hearing concerning plaintiffs' conditions and resources.

(a)

Turning to the last argument, in view of the extensive legislative history and prior state litigation relating to TCF, this court was not required to take new testimony to establish first, that the TCF program was for the multiply disabled nor, second, to determine that plaintiff had such multiple disabilities, and third, to determine that plaintiffs' resources were not adequate to cover the costs. The State's and the

County's administration of the TCF program established all of these, in the absence of any colorable claim to the contrary by the County.

Moreover, to award preliminary relief, it is not always necessary to seek evidence beyond the pleadings and submissions. The County has raised no non-frivolous questions of fact in its latest submission; nor did it do so at the conference held on March 6, 1996 nor in its earlier submissions. It has raised a number of non-frivolous disagreements as to law in these submissions. The April 3, 1996 memorandum and order, drawing on *Drywall Tapers and Pointers v. Local 530*, 954 F.2d 69, 76-77 (2d Cir. 1992) (brackets in original), noted:

> Although a hearing is generally required on a motion for a preliminary injunction, "*Fengler* does not stand for the proposition that a hearing must be held in all preliminary injunction cases. . . . The most significant factors [on which the injunction was based] . . . would have remained essentially unchanged by any additional evidence."

Quoting *Republic of Philippines v. New York Land Co.*, 852 F.2d 33, 37 (2d Cir. 1988), citing *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745 (2d Cir. 1987).

No evidentiary hearing is required here because the documents submitted by the County, as it requested, "speak[ ] for themselves," and make clear that the County "official[ly]" withdrew from TCF only in late November 1995. Sklar Ltr. dated March 13, 1996, Tr. at 44, Commissioner Wingate Ltr. to State officials dated November 24, 1995. Because no claim was made that Suffolk County's participants were significantly different from those elsewhere in the state, the legislative and litigation history of the TCF program is relied upon. This history provides ample evidence of the nature of the participants and the State's problem in making placements other than TCF available to them.

(b)

The County argues that the right to procedural due process "must" emanate from state law, apparently on the basis that persons "not involuntarily confined to institutions" have no protected interest in safe institutionalization under the Constitution. This argument places unwarranted emphasis upon the "voluntary" character of plaintiffs' placement, a feature specifically discounted by the Second Circuit in *Good Will*, 737 F.2d at 1246, with respect to similarly disabled, institutionalized persons. "Even granting that the State of New York was not required to build schools for the mentally retarded or admit voluntary residents, once it chose to house those voluntary residents, thus making them dependent on the state, it was required to do so in a manner that would not deprive them of constitutional rights." Here, Suffolk County chose to participate in the institutionalization of these plaintiffs through its participation in TCF. Having chosen to participate, it could not withdraw in a manner that would deprive plaintiffs of the constitutional rights to safe confinement.

In addition, there is a genuine issue as to whether, in any event, there can be "voluntary" placement of adults too disabled to give consent for themselves, who had been institutionalized as children with the consent of their parents/guardians, and who would not be permitted to leave their institutions if they merely asked to do so. *See Suffolk Parents v. Pataki*, ___ F.Supp. ___, 1996 WL 173024 at *11 (E.D.N.Y. April 2, 1996), noting that the Eighth Circuit, in *Kennedy v. Schafer*, 71 F.3d 292, 294 (8th Cir. 1995), stated: "We see no reason why a patient originally committed voluntarily must retain that status permanently. Facts change, and legal status follows facts." That court suggested that a reasonable basis for testing whether someone is a "voluntary" patient is whether the patient "had the absolute right to leave the hospital by simply requesting to be released." *Id.* at 295.

It is instructive that the County fails to address the holdings of *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Society for*

Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), except by its aside with respect to voluntary placement, but rather chooses to assert that "the right to procedural due process [must] emanate from state law," citing for this proposition a 1963 decision concerned with state laws limiting entry into the trade of debt adjusting to lawyers, *Ferguson v. Skrupa*, 372 U.S. 726. The Second Circuit, in *Hertz Corp. v. City of New York*, 1 F.3d 121, 132 (1993), noted the limitation of the holding of *Ferguson* to economic regulation: "[S]ince demise of substantive due process in economic area, due process provides legislative bodies broad scope to experiment with economic problems." (Summarizing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 106-07 (1978)). *Ferguson* is, of course, a statement of the post-New Deal Court's disfavor for *Lochner v. New York*, 198 U.S. 45 (1905), standing for the use of substantive due process to invalidate state regulation of commercial dealings, an issue that has little relevance to the liberty interests of institutionalized severely disabled adults here affected by the County's withdrawal from the TCF program.

In fact, entitlement to procedural due process is not solely dependent on state law as the County asserts. The Second Circuit, in *West Farm Associates v. State Traffic Commission*, 951 F.2d 469, 472 (2d Cir. 1991), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), held that, for an interest to rise to the level that its threatened deprivation invokes constitutional procedural due process requirements, " 'the nature of the interest [must be] one within the 'liberty or property' language of the Fourteenth Amendment.' "

Procedural due process is essential to assuring these individuals' interest in safe confinement, for the very reasons identified by Justice Blackmun, writing for the majority, in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 797 (1980):

> Procedural due process seeks to ensure the accurate determination of decisional facts, and informed unbiased exercises of official discretion. To the extent procedural

safeguards achieve these ends, they reduce the likelihood that persons will forfeit important interests without sufficient justification.

Serious interests are at stake here. While a post-deprivation hearing is adequate when a prisoner has lost the hobby kit at issue in *Parratt v. Taylor*, 451 U.S. 527 (1981), a pre-deprivation hearing is required for more important interests like penal and, as here, non-penal confinement, whenever circumstances permit. *See Parratt*, (post-deprivation tort remedies are adequate redress for deprivation of property like the hobby kit at issue in the case) as opposed to *Calhoun v. New York State Div. Of Parole Officers*, 999 F.2d 647 (2d Cir. 1993) (addition of five days to an inmate's sentence violated inmate's liberty interest and required giving him an adequate opportunity to be heard prior to the deprivation). *See also Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 20 (1978) ("Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation. Moreover, the probability of error in utility cutoff decisions is not so insubstantial as to warrant dispensing with all process prior to termination.").

(c)

Although the County argues that the April 2nd opinion accepted plaintiffs' reliance theory and held that the County was estopped thereby from withdrawal from TCF, in fact, it specifically relied on the timing of the County's official action, in particular, the formal adoption of the County's 1996 Budget, as the appropriate point for determining the County's duty. Reliance was not placed on numerous unilateral and often contradictory communications by any of the several political actors in the County Executive and Legislature. Even though plaintiffs may have asserted such a theory, it was not the basis for the decision. Moreover, the County defendants have misconstrued the court's holding with regard to plain-

tiffs' due process entitlement under the Constitution. It is not that plaintiffs are entitled to TCF funding because of their disabilities: it is rather that, once the County undertook, along with the State, to provide residential care for these individuals, it was obligated to provide necessary, safe conditions and freedom from undue restraint, determined by the exercise of professional judgment.

Having provided less than six weeks notice that it was withdrawing support for their care, the County cannot abruptly leave these severely disabled individuals stranded without providing a phase out that permits them to obtain, with the exercise of professional judgment, alternative care. When the County decided to go out of the business of providing residential placements for these severely disabled adults, it had a constitutional obligation to do so in an orderly manner. Adopting a budget in late November 1995 that ended TCF funding as of December 31, 1995 was not enough. It abandoned these individuals at their unpaid care-givers and failed to provide adequate time for the consultative process required for proper alternative arrangements to be made. The County thus violated its procedural due process obligations to plaintiffs.

The County's obligations are, however, proportionate to its financial and programmatic responsibilities and, in any event are lesser obligations than those of the State. In view of the State's longer and controlling involvement in plaintiffs' institutionalization, its procedural due process obligations to plaintiffs are commensurately far greater. Thus, should the County prevail in its appeal of the court's order, the State's obligations to plaintiffs dictate that it must immediately assume funding of plaintiffs' care, so as to preserve their interests in humane confinement.[9]

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[9] The State, in its letter opposing this clarification of the order, characterizes plaintiffs' request as an untimely motion to reargue. In fact, this clarification merely makes explicit an obvious corollary to the apportionment of liability for the violation of plaintiffs' constitutional rights between the County and the State. The long-term, continuing liability is that of the State while the County has limited phase-out liability. Should

The County's action in late November did not provide adequate notice to permit the parents and the State and the institutions to prepare for the cessation of funding. Thus plaintiffs have a likelihood of success on their constitutional claims and the balance of hardships certainly tips in plaintiffs' favor. The Second Circuit has recently ruled that where activity has been enjoined that "qualif[ies] as action taken 'pursuant to a statutory . . . scheme,' " the plaintiff must demonstrate not only irreparable harm and " 'sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief,' " meeting what is known as the "fair ground for litigation standard," but, rather, the more demanding standard of "likelihood of success on the merits." "This exception reflects the idea that governmental policies implemented through legislation . . . through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). Here, plaintiffs have clearly met that more stringent standard.

4. The Public Interest

The County asserts that the public interest is determined here by the "judgment . . . of the electorate of Suffolk County as expressed through its elected officials. . . . [They] were elected on platforms to reduce government spending." Presumably, elimination of care for the four plaintiffs is required to accomplish that goal. Under the County's argument, any harm that may befall plaintiffs, even the loss of hard-won functioning skills or even life, is unworthy of consideration compared to a reduction in the County budget amounting to less than one hundredth of a percent.

However, another public interest—this one a constitutional one—espoused by the Supreme Court in *Youngberg* and the

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the County prevail on appeal in its argument that it has no liability, clearly the State's total liability merely attaches earlier.

Second Circuit in *Good Will*, is found in the requirement that state actors who played a controlling role in the continuing institutionalization of the plaintiffs must use professional judgment in deciding issues that have a substantial impact on the institutionalized care of severely disabled persons, where their lives and basic functioning are at stake. The preliminary injunction is required to maintain the status quo so that plaintiffs may assert their rights in litigation and to proceed to make alternative arrangements with assistance of professional judgment.

Accordingly, there should be no stay of that portion of the injunction under which the County, for a maximum of six months form the date of the order, will maintain plaintiffs in their present placements, pending development of alternative in-state placements by the State. The incremental cost to the County is limited. The administrative burden is also not great because the impact of this determination is limited to a group of people that the State has determined, and the County has confirmed, to be so severely handicapped that residential care was required but could not be provided within the state.

5. Mandatory Injunction

Finally, the County argues that the relief provided under the preliminary injunction may be characterized as a "mandatory injunction," granting plaintiffs the ultimate relief they requested. The objective in issuing the preliminary injunction here was to retain plaintiffs' status quo because, unless it is retained, plaintiffs would be irreparably harmed, losing the object of their suit before there is any opportunity for it to ever be decided on the merits.

In addition, the County also argues, perhaps in the alternative, that the opinion effectively granted partial summary judgment on the issues of the arrears for plaintiffs' care from January 1, 1996 to the date of the order, April 2, 1996. Apparently on this basis, the County has asserted that its provision of a supersedeas bond complies with Rule 62(d) and entitles it to an automatic stay of the order to pay arrears. Wright,

Miller and Kane note that: "[An automatic stay upon appeal] may not be obtained in injunction cases . . . In those . . . cases it is discretionary with the court whether to allow a stay." 11 *Federal Practice and Procedure* § 2905 (1994).

On the other hand, without crediting the County's assertion that the order to pay the arrears constituted partial summary judgment, exercising the court's discretion with regard to a stay in connection with an injunction, the order to pay the *arrears* is stayed without prejudice to plaintiffs' production of evidence that the status quo cannot be maintained unless the arrears are paid. *See* Fed. Rule Civ. Proc. 62(c):

> When an appeal is taken from an interlocutory . . . judgment granting . . . or denying an injunction, the court in its discretion may . . . modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

See also Newton v. Consolidated Gas Co. of New York, 258 U.S. 165, 177 (1922) ("Undoubtedly, after appeal the trial court may, if the purposes of Justice require, preserve the status quo until decision by the appellate court."). There has been no evidence that the patience shown by the institutions at which plaintiffs reside, although it cannot continue indefinitely, would not be preserved by payment of ongoing costs, with payment of the arrears to await the results of an appeal.

Consideration of all the factors that must be established under the Second Circuit's test for issuance of a stay lead to the conclusion that the County has not met its "difficult burden." *Private Sanitation*, 44 F.3d at 1084. Movants have failed to establish they will suffer irreparable harm from enforcement of the injunction where there is a modest financial impact. The monetary harm that will be suffered by the

County if a stay is denied, sixty percent of which is eligible for reimbursement from the State, can scarcely be compared to the personal harm that is likely to befall these plaintiffs were a stay granted. In contrast, it is clear that plaintiffs would suffer substantial harm from a stay. In addition, movants have not established that the public interest would be advanced by a stay, while plaintiffs have established a substantial likelihood of success on appeal.

Accurate determination of appropriate placement requires careful review of plaintiffs' requirements and suitability of proposed placements or other discharge arrangements. Failure to provide such review can lead to the forfeiture of plaintiffs' interests in humane confinement. Thus the County's abrupt cessation of Transitional Care Funding with no prospect for immediate or even prompt transition to existing placements must be enjoined.

Conclusion

Accordingly, the Suffolk County defendants' motion for a stay of the preliminary injunction, pending appeal, is denied in part and granted in part. That portion of the County's request for a stay that relates to the payment of arrears is granted without prejudice to plaintiffs' right to apply for reinstatement upon a showing that the status quo cannot otherwise be maintained. That portion or the County's request for a stay relating to the order to pay the on-going costs of institutionalization is denied.

The injunction is hereby revised to order the State defendants, Governor Pataki and the Commissioners of the Office of Mental Retardation and Developmental Disabilities, the Office of Mental Health, and the Department of Social Services, following the expiration of the six month period for which the County is responsible for TCF, or, should the County prevail on appeal, as of April 2, 1996, to take all necessary steps including, but not limited to, payment of out-of-state facilities at which any plaintiffs still reside under TCF,

to maintain plaintiffs in the TCF placement until, following evaluation procedures evincing the exercise of professional judgment, in compliance with the standards enunciated in *Youngberg* and *Good Will*, orderly transition to permanent State approved placement or other discharge arrangement is accomplished.

Dated: Brooklyn, New York
April 24, 1996

SO ORDERED:

/s/ DAVID G. TRAGER
David G. Trager
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-96-0288

SUFFOLK PARENTS OF HANDICAPPED ADULTS; and IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE, and RICHARD ROE, as parents and guardians of, respectively, LORA HOOPS; ANDREW GATLAND; JAMES SENSALE; LOURDES ARON; GLENNA HAMID; KAREN DEVOE; JOHN DOE, and RACHEL ROE,

Plaintiffs,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE; BRIAN WING, and JOHN B. WINGATE, as Commissioners of, respectively, the New York State Office of Mental Retardation and Developmental Disabilities; the New York State Office of Mental Health; the New York State Department of Social Services, and the Commissioner of the Department of Social Services; and SUFFOLK COUNTY,

Defendants.

MEMORANDUM AND ORDER

TRAGER, *District Judge*:

This action was brought by four profoundly disabled and medically fragile adults, who have been institutionalized under joint State-local programs for many years, most recently under a program called Transitional Care Funding (TCF).[1]

A preliminary injunction was issued that ordered the Suffolk County defendants to pay the ongoing costs for the care of the plaintiffs for a period of six months and also to pay the arrears. It also ordered the State defendants to assume the cost of care for the plaintiffs upon the expiration of the period for which the County defendants were to be held responsible and to use all good efforts to place them in appropriate placements within the state. ___ F. Supp. ___, 1996 WL 173024, *17 (E.D.N.Y. April 2, 1996). The Suffolk County defendants filed a notice of appeal and moved in this court for a stay pending appeal. The County defendants' motion for a stay was granted with respect to the order to pay the arrears and denied with respect to the order to pay plaintiffs' ongoing costs. 1996 WL 239345, *11. The original order was clarified to make explicit that, should the County defendants prevail on appeal, the State defendants' responsibility for the full costs of plaintiffs' care would be effective as of April 2, 1996, rather than six months later. *Id.* at *9, *11. (If the County were to pay the costs, the State would reimburse it for sixty percent of these costs during this six month period under the terms of the established State TCF program.)

The County defendants appealed the denial of their motion for a stay to the Court of Appeals for the Second Circuit.

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[1] Familiarity with the prior opinions in this case, *Suffolk Parents of Handicapped Adults v. Pataki*, ___ F. Supp. ___, 1996 WL 239345 (E.D.N.Y. April 24, 1996) and ___ F. Supp. ___, 1996 WL 173024 (E.D. N.Y. April 2, 1996) and in a case concerning many of the same issues, *Brooks v. Pataki*, 95-CV-2902, 908 F. Supp. 1142 and 908 F. Supp. 1157 (E.D.N.Y. 1995), is presumed.

Following oral argument on May 14, 1996, that court granted a stay to the County defendants and expedited the appeal.[2]

The plaintiffs immediately requested this court to enforce its prior order against the State defendants. Burke Ltr. dated May 14, 1996. The State defendants replied, arguing that the order was contingent on "the Circuit's ultimate determination of the merits." Abramowitz Ltr. dated May 14, 1996.

The State has also asserted that the panel's "questions and statements," "made clear . . . that State defendants' liability is contingent upon participation by the locality . . ." However, such a conclusion is "indignant[ly]" contested by the plaintiffs, Burke Ltr. dated May 15, 1996, and, when requested by the court's clerk, the State indicated its inability to obtain the tape of the proceeding. In any event, the State has failed to cite any authority for giving legal effect to a court's "questions and statements" during oral argument.

It should be noted that the Second Circuit's grant of a stay to the County defendants here was in marked contrast to its denial of a similar request by the State defendants in *Brooks v. Pataki* (a fact noted by the Second Circuit panel during oral argument on Suffolk County's motion), a case presenting substantially the same issues, but one in which the State possessed the powerful defense of res judicata, a defense inapplicable here.[3]

A district court's power to *enforce* an order despite the pendency of an appeal is well-recognized. Judge Haight, in *In re Prudential Lines, Inc.*, 170 B.R. 222 (S.D.N.Y. 1994)), stated:

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[2] The Second Circuit also consolidated the State and County defendants' appeals and denied plaintiffs' motion to consolidate the *Suffolk Parents* appeal with that of *Brooks v. Pataki*.

[3] In *Brooks v. Pataki*, a state court action challenging the City and State termination of TCF funding had proceeded to judgment before suit was even filed in federal court. In that proceeding the constitutional considerations critical here had not been addressed as the apparent result of confusion on the part of the plaintiffs about the exclusion of constitutional claims in collateral actions challenging administrative rulings. Thus, relief in *Brooks* was premised on actions taken by the State *following* the City's termination of funding.

clients." Tr. at 37-38. Subjecting these non-profit institutions, which cared for New York State residents so severely disabled that no institution in New York State would take them, to unlimited liability for care for these individuals, as both the County and the State have urged, gives fresh meaning to the old saw, no good deed shall go unpunished. Balancing the very lives and functioning of these fragile individuals against a relatively modest and limited incremental cost to the County weighs markedly against granting a stay.

3. Movant Has Substantial Possibility of Success on Appeal

The County argues that it will prevail on appeal because this court impermissibly used "the due process clause to nullify governmental acts . . . believe[d] to be unwise or incompatible with some particular social philosophy." The County also asserts it will prevail on appeal because the injunction was based on a legal argument that reliance created by the County's communications estopped the County from withdrawing. In addition, the County argues that the order, as it related to the arrears for care of plaintiffs, constituted a mandatory injunction, representing partial summary judgment in favor of plaintiffs. Finally, the County repeats its arguments that the County defendants were not fully heard, specifically referring to the lack of a hearing concerning plaintiffs' conditions and resources.

(a)

Turning to the last argument, in view of the extensive legislative history and prior state litigation relating to TCF, this court was not required to take new testimony to establish first, that the TCF program was for the multiply disabled nor, second, to determine that plaintiff had such multiple disabilities, and third, to determine that plaintiffs' resources were not adequate to cover the costs. The State's and the

County's administration of the TCF program established all of these, in the absence of any colorable claim to the contrary by the County.

Moreover, to award preliminary relief, it is not always necessary to seek evidence beyond the pleadings and submissions. The County has raised no non-frivolous questions of fact in its latest submission; nor did it do so at the conference held on March 6, 1996 nor in its earlier submissions. It has raised a number of non-frivolous disagreements as to law in these submissions. The April 3, 1996 memorandum and order, drawing on *Drywall Tapers and Pointers v. Local 530*, 954 F.2d 69, 76-77 (2d Cir. 1992) (brackets in original), noted:

> Although a hearing is generally required on a motion for a preliminary injunction, "*Fengler* does not stand for the proposition that a hearing must be held in all preliminary injunction cases. . . . The most significant factors [on which the injunction was based] . . . would have remained essentially unchanged by any additional evidence."

Quoting *Republic of Philippines v. New York Land Co.*, 852 F.2d 33, 37 (2d Cir. 1988), citing *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745 (2d Cir. 1987).

No evidentiary hearing is required here because the documents submitted by the County, as it requested, "speak[ ] for themselves," and make clear that the County "official[ly]" withdrew from TCF only in late November 1995. Sklar Ltr. dated March 13, 1996, Tr. at 44, Commissioner Wingate Ltr. to State officials dated November 24, 1995. Because no claim was made that Suffolk County's participants were significantly different from those elsewhere in the state, the legislative and litigation history of the TCF program is relied upon. This history provides ample evidence of the nature of the participants and the State's problem in making placements other than TCF available to them.

(b)

The County argues that the right to procedural due process "must" emanate from state law, apparently on the basis that persons "not involuntarily confined to institutions" have no protected interest in safe institutionalization under the Constitution. This argument places unwarranted emphasis upon the "voluntary" character of plaintiffs' placement, a feature specifically discounted by the Second Circuit in *Good Will*, 737 F.2d at 1246, with respect to similarly disabled, institutionalized persons. "Even granting that the State of New York was not required to build schools for the mentally retarded or admit voluntary residents, once it chose to house those voluntary residents, thus making them dependent on the state, it was required to do so in a manner that would not deprive them of constitutional rights." Here, Suffolk County chose to participate in the institutionalization of these plaintiffs through its participation in TCF. Having chosen to participate, it could not withdraw in a manner that would deprive plaintiffs of the constitutional rights to safe confinement.

In addition, there is a genuine issue as to whether, in any event, there can be "voluntary" placement of adults too disabled to give consent for themselves, who had been institutionalized as children with the consent of their parents/guardians, and who would not be permitted to leave their institutions if they merely asked to do so. *See Suffolk Parents v. Pataki*, ___ F.Supp. ___, 1996 WL 173024 at *11 (E.D.N.Y. April 2, 1996), noting that the Eighth Circuit, in *Kennedy v. Schafer*, 71 F.3d 292, 294 (8th Cir. 1995), stated: "We see no reason why a patient originally committed voluntarily must retain that status permanently. Facts change, and legal status follows facts." That court suggested that a reasonable basis for testing whether someone is a "voluntary" patient is whether the patient "had the absolute right to leave the hospital by simply requesting to be released." *Id.* at 295.

It is instructive that the County fails to address the holdings of *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Society for*

Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), except by its aside with respect to voluntary placement, but rather chooses to assert that "the right to procedural due process [must] emanate from state law," citing for this proposition a 1963 decision concerned with state laws limiting entry into the trade of debt adjusting to lawyers, *Ferguson v. Skrupa*, 372 U.S. 726. The Second Circuit, in *Hertz Corp. v. City of New York*, 1 F.3d 121, 132 (1993), noted the limitation of the holding of *Ferguson* to economic regulation: "[S]ince demise of substantive due process in economic area, due process provides legislative bodies broad scope to experiment with economic problems." (Summarizing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 106-07 (1978)). *Ferguson* is, of course, a statement of the post-New Deal Court's disfavor for *Lochner v. New York*, 198 U.S. 45 (1905), standing for the use of substantive due process to invalidate state regulation of commercial dealings, an issue that has little relevance to the liberty interests of institutionalized severely disabled adults here affected by the County's withdrawal from the TCF program.

In fact, entitlement to procedural due process is not solely dependent on state law as the County asserts. The Second Circuit, in *West Farm Associates v. State Traffic Commission*, 951 F.2d 469, 472 (2d Cir. 1991), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), held that, for an interest to rise to the level that its threatened deprivation invokes constitutional procedural due process requirements, " 'the nature of the interest [must be] one within the 'liberty or property' language of the Fourteenth Amendment.' "

Procedural due process is essential to assuring these individuals' interest in safe confinement, for the very reasons identified by Justice Blackmun, writing for the majority, in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 797 (1980):

> Procedural due process seeks to ensure the accurate determination of decisional facts, and informed unbiased exercises of official discretion. To the extent procedural

safeguards achieve these ends, they reduce the likelihood that persons will forfeit important interests without sufficient justification.

Serious interests are at stake here. While a post-deprivation hearing is adequate when a prisoner has lost the hobby kit at issue in *Parratt v. Taylor*, 451 U.S. 527 (1981), a pre-deprivation hearing is required for more important interests like penal and, as here, non-penal confinement, whenever circumstances permit. *See Parratt*, (post-deprivation tort remedies are adequate redress for deprivation of property like the hobby kit at issue in the case) as opposed to *Calhoun v. New York State Div. Of Parole Officers*, 999 F.2d 647 (2d Cir. 1993) (addition of five days to an inmate's sentence violated inmate's liberty interest and required giving him an adequate opportunity to be heard prior to the deprivation). *See also Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 20 (1978) ("Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation. Moreover, the probability of error in utility cutoff decisions is not so insubstantial as to warrant dispensing with all process prior to termination.").

(c)

Although the County argues that the April 2nd opinion accepted plaintiffs' reliance theory and held that the County was estopped thereby from withdrawal from TCF, in fact, it specifically relied on the timing of the County's official action, in particular, the formal adoption of the County's 1996 Budget, as the appropriate point for determining the County's duty. Reliance was not placed on numerous unilateral and often contradictory communications by any of the several political actors in the County Executive and Legislature. Even though plaintiffs may have asserted such a theory, it was not the basis for the decision. Moreover, the County defendants have misconstrued the court's holding with regard to plain-

tiffs' due process entitlement under the Constitution. It is not that plaintiffs are entitled to TCF funding because of their disabilities: it is rather that, once the County undertook, along with the State, to provide residential care for these individuals, it was obligated to provide necessary, safe conditions and freedom from undue restraint, determined by the exercise of professional judgment.

Having provided less than six weeks notice that it was withdrawing support for their care, the County cannot abruptly leave these severely disabled individuals stranded without providing a phase out that permits them to obtain, with the exercise of professional judgment, alternative care. When the County decided to go out of the business of providing residential placements for these severely disabled adults, it had a constitutional obligation to do so in an orderly manner. Adopting a budget in late November 1995 that ended TCF funding as of December 31, 1995 was not enough. It abandoned these individuals at their unpaid care-givers and failed to provide adequate time for the consultative process required for proper alternative arrangements to be made. The County thus violated its procedural due process obligations to plaintiffs.

The County's obligations are, however, proportionate to its financial and programmatic responsibilities and, in any event are lesser obligations than those of the State. In view of the State's longer and controlling involvement in plaintiffs' institutionalization, its procedural due process obligations to plaintiffs are commensurately far greater. Thus, should the County prevail in its appeal of the court's order, the State's obligations to plaintiffs dictate that it must immediately assume funding of plaintiffs' care, so as to preserve their interests in humane confinement.[9]

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[9] The State, in its letter opposing this clarification of the order, characterizes plaintiffs' request as an untimely motion to reargue. In fact, this clarification merely makes explicit an obvious corollary to the apportionment of liability for the violation of plaintiffs' constitutional rights between the County and the State. The long-term, continuing liability is that of the State while the County has limited phase-out liability. Should

The County's action in late November did not provide adequate notice to permit the parents and the State and the institutions to prepare for the cessation of funding. Thus plaintiffs have a likelihood of success on their constitutional claims and the balance of hardships certainly tips in plaintiffs' favor. The Second Circuit has recently ruled that where activity has been enjoined that "qualif[ies] as action taken 'pursuant to a statutory . . . scheme,' " the plaintiff must demonstrate not only irreparable harm and " 'sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief,' " meeting what is known as the "fair ground for litigation standard," but, rather, the more demanding standard of "likelihood of success on the merits." "This exception reflects the idea that governmental policies implemented through legislation . . . through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). Here, plaintiffs have clearly met that more stringent standard.

4. The Public Interest

The County asserts that the public interest is determined here by the "judgment . . . of the electorate of Suffolk County as expressed through its elected officials. . . . [They] were elected on platforms to reduce government spending." Presumably, elimination of care for the four plaintiffs is required to accomplish that goal. Under the County's argument, any harm that may befall plaintiffs, even the loss of hard-won functioning skills or even life, is unworthy of consideration compared to a reduction in the County budget amounting to less than one hundredth of a percent.

However, another public interest—this one a constitutional one—espoused by the Supreme Court in *Youngberg* and the

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the County prevail on appeal in its argument that it has no liability, clearly the State's total liability merely attaches earlier.

Second Circuit in *Good Will*, is found in the requirement that state actors who played a controlling role in the continuing institutionalization of the plaintiffs must use professional judgment in deciding issues that have a substantial impact on the institutionalized care of severely disabled persons, where their lives and basic functioning are at stake. The preliminary injunction is required to maintain the status quo so that plaintiffs may assert their rights in litigation and to proceed to make alternative arrangements with assistance of professional judgment.

Accordingly, there should be no stay of that portion of the injunction under which the County, for a maximum of six months form the date of the order, will maintain plaintiffs in their present placements, pending development of alternative in-state placements by the State. The incremental cost to the County is limited. The administrative burden is also not great because the impact of this determination is limited to a group of people that the State has determined, and the County has confirmed, to be so severely handicapped that residential care was required but could not be provided within the state.

5. Mandatory Injunction

Finally, the County argues that the relief provided under the preliminary injunction may be characterized as a "mandatory injunction," granting plaintiffs the ultimate relief they requested. The objective in issuing the preliminary injunction here was to retain plaintiffs' status quo because, unless it is retained, plaintiffs would be irreparably harmed, losing the object of their suit before there is any opportunity for it to ever be decided on the merits.

In addition, the County also argues, perhaps in the alternative, that the opinion effectively granted partial summary judgment on the issues of the arrears for plaintiffs' care from January 1, 1996 to the date of the order, April 2, 1996. Apparently on this basis, the County has asserted that its provision of a supersedeas bond complies with Rule 62(d) and entitles it to an automatic stay of the order to pay arrears. Wright,

Miller and Kane note that: "[An automatic stay upon appeal] may not be obtained in injunction cases . . . In those . . . cases it is discretionary with the court whether to allow a stay." 11 *Federal Practice and Procedure* § 2905 (1994).

On the other hand, without crediting the County's assertion that the order to pay the arrears constituted partial summary judgment, exercising the court's discretion with regard to a stay in connection with an injunction, the order to pay the *arrears* is stayed without prejudice to plaintiffs' production of evidence that the status quo cannot be maintained unless the arrears are paid. *See* Fed. Rule Civ. Proc. 62(c):

> When an appeal is taken from an interlocutory . . . judgment granting . . . or denying an injunction, the court in its discretion may . . . modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

See also Newton v. Consolidated Gas Co. of New York, 258 U.S. 165, 177 (1922) ("Undoubtedly, after appeal the trial court may, if the purposes of Justice require, preserve the status quo until decision by the appellate court."). There has been no evidence that the patience shown by the institutions at which plaintiffs reside, although it cannot continue indefinitely, would not be preserved by payment of ongoing costs, with payment of the arrears to await the results of an appeal.

Consideration of all the factors that must be established under the Second Circuit's test for issuance of a stay lead to the conclusion that the County has not met its "difficult burden." *Private Sanitation*, 44 F.3d at 1084. Movants have failed to establish they will suffer irreparable harm from enforcement of the injunction where there is a modest financial impact. The monetary harm that will be suffered by the

County if a stay is denied, sixty percent of which is eligible for reimbursement from the State, can scarcely be compared to the personal harm that is likely to befall these plaintiffs were a stay granted. In contrast, it is clear that plaintiffs would suffer substantial harm from a stay. In addition, movants have not established that the public interest would be advanced by a stay, while plaintiffs have established a substantial likelihood of success on appeal.

Accurate determination of appropriate placement requires careful review of plaintiffs' requirements and suitability of proposed placements or other discharge arrangements. Failure to provide such review can lead to the forfeiture of plaintiffs' interests in humane confinement. Thus the County's abrupt cessation of Transitional Care Funding with no prospect for immediate or even prompt transition to existing placements must be enjoined.

Conclusion

Accordingly, the Suffolk County defendants' motion for a stay of the preliminary injunction, pending appeal, is denied in part and granted in part. That portion of the County's request for a stay that relates to the payment of arrears is granted without prejudice to plaintiffs' right to apply for reinstatement upon a showing that the status quo cannot otherwise be maintained. That portion or the County's request for a stay relating to the order to pay the on-going costs of institutionalization is denied.

The injunction is hereby revised to order the State defendants, Governor Pataki and the Commissioners of the Office of Mental Retardation and Developmental Disabilities, the Office of Mental Health, and the Department of Social Services, following the expiration of the six month period for which the County is responsible for TCF, or, should the County prevail on appeal, as of April 2, 1996, to take all necessary steps including, but not limited to, payment of out-of-state facilities at which any plaintiffs still reside under TCF,

to maintain plaintiffs in the TCF placement until, following evaluation procedures evincing the exercise of professional judgment, in compliance with the standards enunciated in *Youngberg* and *Good Will*, orderly transition to permanent State approved placement or other discharge arrangement is accomplished.

Dated: Brooklyn, New York
April 24, 1996

SO ORDERED:

/s/ DAVID G. TRAGER
David G. Trager
United States District Judge

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No. CV-96-0288

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This action was brought by four profoundly disabled and medically fragile adults, who have been institutionalized under joint State-local programs for many years, most recently under a program called Transitional Care Funding (TCF).[1]

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It should be noted that the Second Circuit's grant of a stay to the County defendants here was in marked contrast to its denial of a similar request by the State defendants in *Brooks v. Pataki* (a fact noted by the Second Circuit panel during oral argument on Suffolk County's motion), a case presenting substantially the same issues, but one in which the State possessed the powerful defense of res judicata, a defense inapplicable here.[3]

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[2] The Second Circuit also consolidated the State and County defendants' appeals and denied plaintiffs' motion to consolidate the *Suffolk Parents* appeal with that of *Brooks v. Pataki*.

[3] In *Brooks v. Pataki*, a state court action challenging the City and State termination of TCF funding had proceeded to judgment before suit was even filed in federal court. In that proceeding the constitutional considerations critical here had not been addressed as the apparent result of confusion on the part of the plaintiffs about the exclusion of constitutional claims in collateral actions challenging administrative rulings. Thus, relief in *Brooks* was premised on actions taken by the State *following* the City's termination of funding.

"Courts have accordingly recognized a distinction in the divestment of jurisdiction between acts undertaken to enforce the judgment and acts which expand upon or alter it; the former being permissible and the latter prohibited." He cited *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585 (6th Cir. 1987), in which the court held that the district court had not exceeded its jurisdiction in issuing a contempt citation against an employer for failure to comply with subpoena, despite the pendency of the employer's appeal. "Although a district court may not alter or enlarge the scope of its judgment pending appeal, it does retain jurisdiction to enforce the judgment." *Id.* at 588.

Cincinnati Bronze was also cited by Judge Glasser in *C.H. Sanders Co., Inc v. BHAP Housing Development Fund Company, Inc.*, 750 F. Supp. 67, 69 (E.D.N.Y. 1990) (Glasser, J.), noting that when the appellant has failed to obtain a stay, there is an "exception to the general rule" that "an effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal." When the State defendants, in *Brooks v. Pataki*, sought a stay of the same order to pay for care of comparable plaintiffs in a related case, the Second Circuit denied their request.

Thus, the orders granted in this case remain in effect as regards the State defendants. Because the County defendants have prevailed on their appeal of the denial of their motion for a stay, the contingency attached to the holding against the State defendants in the order denying the County defendants' motion for a stay has been satisfied.

Accordingly, pursuant to the prior orders in this case, because the County defendants have prevailed on their appeal of the denial of their motion for a stay, the State defendants, Governor Pataki and the Commissioners of the Office of Mental Retardation and Developmental Disabilities, the Office of Mental Health, and the Department of Social Services are hereby ordered to take all necessary steps including, but not limited to, payment of out-of-state facilities at which any plaintiffs still reside under TCF, from the date of April 2,

1996, to maintain plaintiffs in their TCF placements until, following evaluation procedures evincing the exercise of professional judgment, in compliance with the standards enunciated in *Youngberg* and *Good Will*, orderly transition to permanent State approved placement or other discharge arrangement is accomplished.

Dated: Brooklyn, New York
May 17, 1996

SO ORDERED:

/s/ DAVID G. TRAGER
David G. Trager
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-7421
Filed: April 29, 1996

SUFFOLK COUNTY, *et al.*,

—v.—

WINGATE

NOTICE OF MOTION FOR STAY PENDING APPEAL (RULE 8) EXPEDITED APPEAL (RULE 27(B)) PERMISSION TO FILE MEMORANDUM OF LAW EXCEEDING 10 PAGES

MOTION BY:

ROBERT J. CIMINO
Suffolk Count Attorney
Attorney for Appellants
Gaffney, Wingate and
Suffolk County
Bldg. 158 North County Complex
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Hauppage, New York 11788

By: Theodore D. Sklar
James M. Catterson

WILLIAM J. BURKE, ESQ.
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Attorneys for Plaintiffs
400 Madison Avenue
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Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained	☐ Yes	☒ No
Yes As to expedited appeal only		

Has service been effected?	☒ Yes	☐ No
Is oral argument desired?	☒ Yes	☐ No
(Substantive motions only)		

Requested return date:
May 7, 1996
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?	☐ Yes	☒ No
B. by firm date of argument notice?	☐ Yes	☒ No

C. If Yes, enter date:

Judge or agency whose order is being appealed:
Honorable David G. Trager, United States District Court Judge, E.D.N.Y.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?	☒ Yes	☐ No
(See F.R.A.P. Rule 8)		
Would expedited appeal eliminate need for this motion?	☐ Yes	☒ No

If No, explain why not:
Expedited appeal will not stay injunctive relief granted by Court below.

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Brief Statement of the relief requested:
Stay of order by Court below directing the County of Suffolk to make payments for an unbudgeted social services program known as Transitional Care Funding, an expedited appeal from the order below and permission to file a memorandum of law exceeding 10 pages on this motion.

By: /s/ THEODORE D. SKLAR
THEODORE D. SKLAR
Assistant County Attorney

April 25, 1996

Appearing for:

	Appellant or Petitioner	
Robert J. Gaffney	☐ Plaintiff	☒ Defendant
John B. Wingate and Suffolk County	Appellee or Respondent	
	☒ Plaintiff	☐ Defendant

Before:

MESKILL, MINER, *Circuit Judges*
and SCULLIN, *District Judge*

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED and the appeal expedited; appellant shall file a brief and appendix by May 28, 1996; appellee shall file a brief by June 11, 1996; appeal to be heard the week of June 24, 1996 subject to the approval of the presiding judge.

George Lange III, Clerk

By: /s/ ARTHUR HELLER

Arthur Heller,
Administrative Attorney

FILED: May 14, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 96-7421; 96-7470; 96-7630
Filed: December 16, 1996

SUFFOLK PARENTS, *et al.*,

Plaintiffs-Appellees,

—v.—

PATAKI, *et al.*,

Defendants-Appellants.

NOTICE OF MOTION FOR STAY OF MANDATE
UNDER 28 USC § 2101(f) AND FRAP 41(b)

MOTION BY:

WILLIAM J. BURKE, ESQ.
BURKE & STONE
400 Madison Avenue
New York, New York 10017
(212) 752-5353

Has consent of opposing counsel:

A. been sought?	☐ Yes	☒ No
B. been obtained	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Decided 4 November 1996

Judge or agency whose order is being appealed:
David G. Trager, USDJ, EDNY

OPPOSING COUNSEL:

AAG AMY ABRAMOWITZ
NY Attorney General
120 Broadway
New York, New York 10271
(212) 416-8599

Brief Statement of the relief requested:
Stay issuance of mandate pending filing of petition for *Certiorari*, limited to equal protection grounds.

By: /s/ WILLIAM J. BURKE
WILLIAM J. BURKE

December 12, 1996

Appellant or Petitioner
☐ Plaintiff ☐ Defendant
Appellee or Respondent
☒ Plaintiff ☐ Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

ILLEGIBLE

FRED J. PARKER
Circuit Judge

FILED: December 31, 1996

AMENDED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2224—August Term 1995

(Argued: June 24, 1996 Decided: November 4, 1996
Amended: December 9, 1996

Docket Nos. 96-7421, 96-7470, 96-7630

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of December, one thousand nine hundred and ninety-six.

PRESENT:

HONORABLE ROGER J. MINER,
HONORABLE DENNIS JACOBS,
HONORABLE FRED I. PARKER,
Circuit Judges.

SUFFOLK PARENTS OF HANDICAPPED ADULT; IRENE HOOPS; FRANK GATLAND; FRANCES SENSALE LENZO; JOYCE B. ARON; LILLIAN MELVILLE HAMID; MARGARET DEVOE; JANE DOE; RACHEL ROE; LORA HOOPS; ANDREW GATLAND; JAMES SENSALE; LOURDES ARON; GLENNA HAMID; KAREN DEVOE; RICHARD ROE, as parents and guardians of, respectively, Lora Hoops; Andrew Gatland; James Sensale; Lourdes Aron; Glenna Hamid; Karen DeVoe; John Doe, and Rachel Roe,

Plaintiffs-Appellees,

—v.—

JOHN B. WINGATE, as Commissioner of the Suffolk County Department of Social Services and SUFFOLK COUNTY; GEORGE PATAKI, as Governor of the State of New York; ROBERT J. GAFFNEY, as County Executive of Suffolk County; THOMAS A. MAUL; JAMES L. STONE and BRIAN WING,

Defendants-Appellants.

ORDER DENYING REHEARING AND AMENDING OPINION

It is hereby Ordered that the petition for rehearing filed by the Appellees in the above-captioned case is Denied.

It is also hereby Ordered that the opinion issued in this case, on November 4, 1996, be amended as follows:

The second full paragraph on page 8821 of the slip opinion (beginning with "The State asserts . . . .") is replaced by the following full paragraph:

> The State asserts that it has a rational basis for funding only in-state residential programs that it can license, certify, and oversee, and through which it can effectively regulate the care given to its disabled citizens. We agree that the State does have a legitimate interest in regulating the treatment programs and residential care facilities for which it pays and in which its disabled adult citizens are placed.[6] The agencies charged with administering the State's programs, however, have no authority to regulate the facilities in neighboring states where the plaintiffs now live.[7]

The text of footnotes Nos. 6 and 7 in the second full paragraph on page 8821 of the slip opinion remains unchanged in the amended paragraph. As indicated, the footnotes are located in the same positions as in the slip opinion, at the end of the second and third sentences of the paragraph (after ". . . placed." and ". . . live.").

[LETTERHEAD OF NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES]

May 21, 1991

To: See Below

From: Paul Richer, NYS Department of Social Services (SDSS) Ellen Ashton, NYS Office of Mental Retardation and Developmental Disabilities (OMRDD)

Subject: Woods School Visitation

On May 22 and May 23, 1991, the authors of this report visited the Woods School in Langhorne, Pennsylvania. This visit was an outgrowth of a series of meetings, chaired by the Council on Children and Families (CCF), which examined, in a general way, the residential placement of transitionally-funded young adults, in out-of-state facilities. Other agencies involved in these discussions, in addition to SDSS, OMRDD, and CCF, were the New York State Education Department (SED), the Office of Mental Health (OMH), the Commission on Quality of Care for the Mentally Disabled (CQC), and the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), formerly the Office of Vocational Rehabilitation (OVR).

This inter-agency committee was concerned about the apparent lack of supervision provided by any New York State agency for the approximately 70 transitionally-funded young adults at the Woods School. The reviewers were asked to visit the facility, and to evaluate the school in terms of the basic level of care provided these clients. In most simple terms, we were asked to respond to the question: "Is the Woods School

providing appropriate care and treatment for the New York State transitionally-funded young adults in residence at the facility?"

The short answer to this question is: yes.

Over the course of the two day visit, the reviewers did the following:

(a) Visited and inspected eleven living units, utilizing the standards of the Modified CQC Instrument (Cook's Tour Survey);

(b) Observed evening meals in four cottages, breakfasts in three units, and lunches in all three day programming sites;

(c) Monitored the medication regimen in two living units, and one day treatment center;

(d) Observed late afternoon and early evening recreational activities at six sites;

(e) Visited all three sites at which day programming is provided, i.e., the Gardner Educational Center, The Woods Enterprise, and the Holland Adult Day Treatment Center;

(f) Read the comprehensive records of six transitionally-funded young adults, selected at random, and referenced them against specific treatment practices, observed on a selective basis;

(g) Reviewed 32 activity schedules for May, and referenced them against specific activities actually in progress, on a selective basis;

(h) Reviewed menus for the week in question, and referenced them against actual foods served to clients at the three meals observed, on a selective basis;

(i) Visited several support units, including the central laundry and the central nutrition center;

(j) Informally interviewed several staff, including child care workers, child care supervisors, program managers,

teachers, school administrators, workshop staff, nurses, clinical staff, therapists, and a variety of support staff.

(k) Visited several senior citizen residences, and received a briefing on the variety of services provided to older residents.

(l) Received an informal briefing on the current status of the facility from Don Frey, Pennsylvania Department of Public Welfare, the agency responsible for the licensing of the Woods School; and

(m) Provided an informal debriefing for Woods School administrative staff.

While individual records of students were read, and while these individual students were observed in program, it is important to note that the purpose of this visit was to evaluate the program, in its broadest sense, and not to make judgments about the individual treatment programs of individual clients.

What did we conclude, as a result of our visit?

(a) An appropriate number of staff were on duty at all times with the clients.

(b) The grounds of the facility were beautifully maintained. Each living unit was designed to give it its own front and back yards, thus reducing the institutional feeling of the facility. Walkways and roads were in excellent condition.

(c) The interiors of all of the living units were clean, well-ventilated, odor-free and free of any kind of infestation. The units were in good repair, and were superbly maintained and well-lit. Most of the units were designed with large windows, creating a very warm and inviting environment. All of the cottages were colorfully decorated. A home-like ambience was apparent in all of the units.

(d) Furnishings in the units were clean, in good repair, and provided appropriately for all of the residents.

(e) No fire or safety hazards were observed.

(f) Security appeared to be excellent, and all visitors were carefully monitored and were required to provide appropriate identification.

(g) Special security precautions were established at night, with many roads closed off, thus reducing the likelihood of unsupervised visitation.

(h) Fire extinguishers and smoke/heat detectors were present, appropriately installed, and had been routinely inspected and tested.

(i) Fire evacuation procedures were conspicuously posted.

(j) Fire and emergency drills were regularly conducted, and records of such drills were maintained.

(k) Emergency phone numbers were appropriately posted throughout all buildings.

(l) All residents were appropriately groomed. They were clean, and all clients appeared to have had recent shampoos. The men were clean shaven.

(m) Residents were wearing personal clothing that was clean, that fit, and that was appropriate for the season. This included footwear.

(n) All residents were provided with sufficient personal hygiene supplies.

(o) All residents were provided with clean linens regularly, on a daily basis if necessary.

(p) All residents were provided laundry facilities, on a daily basis if necessary.

(q) All residents received the assistance necessary with regard to all activities of daily living, including laundry.

(r) Bathrooms were well stocked with appropriate supplies.

(s) Residents' rights with respect to privacy, telephone use, visitation, mail, and personal allowance were strictly and appropriately observed.

(t) Weekly menus were posted appropriately.

(u) Individual diet requirements were rigorously met (with almost 80% of the clients on some kind of special diet).

(v) Residents were provided with well-balanced meals, including appropriate beverages, attractively served on appropriate dishes with appropriate utensils.

(w) Adequate time was afforded clients to eat their meals safely and appropriately. (In some units, given the level of disability of the residents, a meal could take as long as 90 minutes).

(x) Dining room furniture was adequate as to amount and type.

(y) All medications were securely stored, and were currently dated.

(z) A well-organized system was in place for the administration of medications.

(aa) When medications were administered, appropriate records were kept.

(bb) A monthly activity schedule was posted in all living units.

(cc) Residents had access to appropriate recreational equipment and supplies, and were afforded adequate time for recreational activities, during the afternoon, early evening, and on weekends.

(dd) Staff appeared to be caring, and were consistently respectful in their interactions with clients.

(ee) Client records were rigorously maintained. They were comprehensive, extremely well-organized, and appeared to be appropriate in terms of content for the clients monitored.

(ff) Day programming was outstanding. The Workshop was thoughtfully designed, and the clients were actively and appropriately involved in the workshop activities. Clients expressed, verbally and otherwise, enormous pride in the work taking place. The Workshop served a variety of individuals with a wide variety of individual needs, all of which were appropriately and creatively accomodated.

(gg) The school setting was a model of modern special education.

(hh) The facility has developed and implemented an excellent and sensitive program dealing with human sexuality issues.

(ii) Programs provided for older residents were excellent. Of particular note was the utilization of community-based services for these clients.

While there is something vaguely anachronistic about a facility of this size, there is nothing outmoded about the content of its programming. The school can be proud of what it is, proud of what it is doing on behalf of the nearly 600 residents it serves. New York can feel comfortable that when it sends its citizens to the Woods School, they will receive superb care and treatment in an environment that is warm, caring and safe.

To: Jim Purcell
Anona Joseph
Bill McLaughlin
Ed Cox
Doris Doyle
Elin Howe
James M. Walsh
Aletha Bauman
Denise Clement
Barbara Kenefick
Vincent Panuolo
Anne McCabe

Caren Craine
Janet Greerman
Elizabeth Chura
William Combes
Emmett McCarthy
Martin Margulies
Don Smith
Dr. Robert Griffith
Pat Boyle Swartz